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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Charlie Lewis Burr, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, and by hand delivery to Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301, on this 25 day of June, 1985.

David A. Davis

DAVID A. DAVIS

QUESTION PRESENTED

PAGE

QUESTION

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE. 10

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Burr v. State, 466 So.2d 1051 (Fla. 1985) is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on February 14, 1985, and petitioner's timely motion for rehearing was denied on April 26, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix I. This case involves the Eighth and Fourteenth Amendments to the United States Constitution; see e.g. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

STATEMENT OF THE CASE

An indictment returned by the Leon County, Florida, grand jury on October 29, 1981, charged Charlie Lewis Burr with first degree murder and robbery with a firearm (R-1-2). Burr proceeded to the guilt phase portion of his trial on June 8, 1982, before the Honorable Charles E. Miner.

The state presented its case, and following the court's denial of Burr's motion for a judgment of acquittal (T-1077), the state's key witness, Domita Williams, took the stand and recanted the testimony she had given for the state implicating Burr in the robbery/murder (T-1237-1238). Other witnesses testified for the defense, bolstering Williams' defense testimony. The state put on a case in rebuttal after which the court instructed the jury. The jury found Burr

guilty as charged on both counts (R-290-292).

At the sentencing phase of the trial, the state presented no additional evidence, but Burr presented several witnesses who said he was a good man and had been raised a Christian (T-435-451). After arguments and instructions, the jury returned a recommendation that Burr live (R-292). The court rejected the jury's recommendation and sentenced Burr to death (R-221-223). The court also sentenced Burr to 99 years in prison for the armed robbery and retained jurisdiction over the first third of that sentence (R-322).

In sentencing Burr to death, the court found in aggravation:

> 1. That the murder was committed during the course of a robbery.
>
> 2. That the murder was committed for the purpose of avoiding or preventing a lawful arrest.
>
> 3. That the murder was committed in a cold, calculated and premeditated manner without any moral or legal justification.

(R-311-320).

The court found nothing in mitigation (R-320).

On appeal the Florida Supreme Court, Burr argued, among other issues, that the jury's recommendation of life was based upon their doubt as to Burr's guilt and that such a basis for recommending life was reasonable, and the trial court should have followed it.

The Florida Supreme Court affirmed the trial court's judgment and sentence in an opinion filed on February 14, 1985. Burr v. State, 466 So.2d 1051 (Fla. 1985). Justices McDonald and Overton consented to the court's affirmance of the death sentence but did so without filing an opinion. The Supreme Court expressly rejected, as a matter of law, doubt as to guilt as a reasonable basis for recommending and imposing a life sentence:

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people can differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert.denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982).

Id. at 1054.

Burr asked the Florida Supreme Court to rehear his case on this issue (See Appendix B) and pointed out to them several cases where that court had acknowledged that doubt as to guilt can be a legitimate basis for a life sentence. The court denied the motion without discussion (See Appendix C).

Burr now comes before this Honorable Court, asking it to consider whether a jury's life recommendation, based solely upon their doubt as to Burr's guilt, is a reasonable basis for imposing a life sentence.

STATEMENT OF THE FACTS

The facts in this case must be divided into two parts, The state's case and the defense' case, because Domita Williams, the state's key witness, recanted her prosecution version of what occurred on the day of the murder when she testified for the defense. As developed later, the fundamental ambiguity of her testimony, while insufficient to preclude the jury from returning a guilty verdict against Burr, was sufficient to raise some doubt of Burr's guilt sufficient to prevent the trial court from imposing death.

I. The state's case

By August 20, 1981, Domita Williams and Charlie Burr had been going together for two or three weeks and were talking of marriage (T-832,856). About 6:30 that morning Burr drove his car to Williams' house so he could take Williams

to work (T-832). Burr went inside and 15 or 20 minutes later, or shortly before 7:00 a.m. (T-833-834), the couple left the house and headed west on Highway 27 towards Tallahassee (T-833). About 7:00 a.m. or a little later (T-834) Burr pulled into the parking lot of a "Suwannee Swiftee" convenience store and waited while Williams went inside (T-834). About five to ten minutes later (T-850) she came out of the store with a cheeseburger and candy bar (T-834). Burr then got out of the car and went inside (T-835). Williams began eating her sandwich and only looked up when she heard a shot (T-836-837). Burr, smiling, got into the car and, seeing that Williams was crying, he asked her what was wrong (T-837). Williams saw the imprint of a gun in his pants (T-838).

Kim Miller, a customer, stopped at the Suwannee Swiftee about 7:00 a.m. and found the body of Steve Hardy, the clerk, lying over an open safe (T-866,871). Hardy had been shot behind the ear with a .22 caliber bullet (T-913); death was instantaneous (T-968). At 7:09 a.m. a dispatcher from the police department received Miller's telephone call reporting the incident (T-868). The police responded and within minutes they had cordoned off the area (T-874). They found, however, no fingerprints or hairs to tie Burr to the murder (T-886). $252.75 had been taken from the store (T-877).

About 8:00 a.m. (T-853) Williams arrived at the Worthington Park Apartments where Burr lived with a Katrina Jackson and her husband (T-918). Tammy Footman, a cousin of Williams, was also there. Williams entered the apartment alone (T-840). She acted nervous (T-1345) and asked if they had heard about the Suwannee Swiftee robbery (T-1357). Williams said that she had bought a cheeseburger there while Burr was inside, and on the way out she had heard a shot. She then got into the car and left (T-1357,957). Whether she left by herself or with Burr is uncertain (T-1358).

Burr came into the apartment a few minutes later (T-1346), and like Williams, he also acted differently (T-1358-1359). He began packing his bags and a short time later Williams and Burr left (T-1360).

At work sometime later, Williams asked her supervisor, Katherine Haygood, if she had heard about the robbery (T-1135). Although Williams could not recall what she had told Haygood (T-841), Haygood said Williams (who was calm) (T-1139) told her she had bought a soda inside the store about 8:00 or 8:30 that morning (T-1138), and while inside she had seen a young white man in bluejeans walking up and down the aisles. Williams then left the store but drove by a short while later and saw several police cars outside the store (T-1137). Although Haygood encouraged Williams to call the police (T-1138), Williams never did (T-842).

Burr picked up Williams after work, and the pair drove to Melbourne for the weekend (T-843). Burr took with him a box of .22 caliber guns which he sold in Melbourne (T-844). Despite what had happened, and although Williams claimed she was afraid of Burr (T-856), she did not look like she was afraid of him (T-960), they continued to act like a couple in love (T-960), and they were still talking of marriage (T-856). (Burr had never threatened Williams (T-863)).

The state also introduced as collateral crimes evidence, the testimony of three convenience clerks who claimed to have been robbed by Burr days after the Tallahassee robbery/murder. Burr was acquitted of committing one of those robberies in a trial subsequent to the one for the Tallahassee crimes.

II. The defense's case

After the state rested, the defense proffered the testimony of Domita Williams. Before the court then and later before the jury, Williams recanted the story she had given as the prosecution's star witness the day before. Williams said that August 20th was the first day she had to report for work

at the Sunland Training Center in Tallahassee. Because she did not have a car of her own, she drover her mother, Minnie Pompey, to work about 6:30 a.m. (T-1156) so that she could use her mother's car to go to her job. Pompey worked at a day care center about a 20 minute drive from where she lived, and that morning, Pompey "punched in" at 6:56 a.m. (T-1157). Williams stayed for a few minutes to put her child into the center, and about five or ten minutes after seven she started on the 20 minute trip back home (T-1158). As she returned home, she passed by the Suwannee Swiftee Store and saw several police cars there (T-1270). She was at work by 9:00 a.m. and about 5:00 or 6:00 p.m., she saw Burr and he stayed with her that evening (T-1271-1272). Pompey corroborated this story when she took the stand, and other witnesses also corroborated Williams' defense story.

A series of customers arrived at the Suwannee Swiftee on August 20, 1981, from shortly before 7:00 a.m. until approximately 7:10 a.m. All saw Steve Hardy alive.

Clarence Lowman arrived about 6:50 a.m. and left right after 7:00 a.m. (T-1078). As he was leaving, two cars drove up (T-1078). Vincent Prichard drove up around 7:00 a.m. As he left the store, he saw a black man wearing glasses walk towards the store, stop, then walk away (T-1082-1083). A tall, young man drove up as Prichard drove off (T-1083). Although Prichard drove away, two minutes later he drove past the store after he had picked up some men (T-1086). As he drove by he saw Kim Miller (the man who discovered Hardy's body), a friend of his, pull into the store (T-1086).

John Thompson pulled into the store about six minutes after seven (T-1096) and parked his car next to a blue Ford (T-1102). When he went inside, he saw Hardy acting unusual, as if he had something else on his mind (T-1106). Another man, not resembling Burr, stood at the back of the

store by the cooler (T-1109). He acted suspicious, as if he was just passing the time (T-1116).

Shortly after 7:00 a.m. Ruth Grant and her daughter Valerie were heading west toward Florida State University along Highway 27. They passed the Suwannee Swiftee and saw several police cars there (T-1194). A short time later, they saw an ambulance heading toward the Suwannee Swiftee and seconds later Domita Williams, a relative of theirs, passed them apparently heading home and past the Suwannee Swiftee (T-1195).

Immediately before the trial, he prosecutor called its witnesses into the office library and questioned them as a group about their individual testimonies (T-1282). When he asked Domita Williams about her story, she said she was not in the car with Burr on the morning of the murder.

> Q. Yesterday morning before you came to the courtroom here, where did you go?
>
> A. To Willie Meggs' office [Willie Meggs was the prosecutor in this case and held the title of an Assistant State Attorney].
>
> Q. Now, before going there, what was going through your mind? What were your intentions before coming there yesterday morning?
>
> A. Telling the truth.
>
> Q. You had decided to tell the truth?
>
> A. Right.
>
> Q. Can you tell the jury about what happened after you went to the State Attorney's Office?
>
> A. What happened? Okay. When we first got there, we were called into the library. I was in there. Katrina Jackson, Tami Footman and an officer and another witness, Darrel Footman, were in there, also. He questioned everybody. So, when he got around to me, I stated that I wasn't in the car the day of the murder.
>
> Q. You told who that?
>
> A. Willie Meggs.
>
> Q. You told him you were not in the car?
>
> A. Right

Q. Did you tell him that your previous statements were not correct?

A. I don't think I did, but I told him I wasn't in the car at all.

Q. What happened after that?

A. He told me to come in his office, which I did. Then I started telling him again that I wasn't in the car. He got bent all out of shape. He didn't want to hear it. He was mad, furious.

Q. He got a little upset?

A. Yes.

Q. What happened after that?

A. I still tried to tell the truth to him. Then he took me in Don Modesitt's office. I was going to tell the truth to him. Then he called me a liar and called me a bitch.

Q. Mr. Modesitt called you that? [Mr. Modesitt was the elected State Attorney for the Second Judicial Circuit of Florida.]

A. Right.

Q. Was he mad with you?

A. Yes, he was.

Q. Did he tell you and indicate to you what the consequences were if you gave two different types of testimony under oath?

A. Yes, he did.

Q. What did you think that meant?

A. I didn't know right then. I was scared.

Q. Did you tell them why didn't you come in here and tell the jury yesterday morning what you are telling them now? Didn't you stick by what you had planned to do that morning?

A. Because Modesitt said he was going to put me in jail, also. That was the second time somebody had told me that. I was afraid of going to jail.

Q. So, you changed your mind?[1]

A. Right.

---

[1]The prosecutor admitted that what Williams said about what happened on the morning of trial was true (T-1254-1255).

On appeal, the Florida Supreme Court characterized the State Attorney's threats as merely encouraging Williams to tell the truth. Yet, the Assistant State Attorney prosecuting the case never so characterized them:

> Q. Did Mr. Modesitt come there and talk to you?
>
> A. Yes, he did.
>
> Q. Did he apologize to you?
>
> A. Yes, but not the way I wanted to to hear it.
>
> Q. He didn't threaten you anymore, though, did he?
>
> A. He mentioned something about crime.

(T-1305) (emphasis supplied).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

On direct appeal to the Florida Supreme Court, Burr raised eight issues. In one of those issues, Burr argued that, in light of Domita Williams' recantation at trial of her state version and the State Attorney's threats to make her change her story, Burr should be given a new trial. See Issue II Appendix D. The Florida Supreme Court rejected that argument characterizing Domita Williams' testimony as merely involving a matter of witness credibility which the jury was particularly suited to resolve. As to the threats by the prosecutor, the court said Domita Williams testified:

> That the State Attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. Burr v. State, 466 So.2d 1051, 1053 (Fla. 1985).

On rehearing, Burr told the court that there was no evidence to support that statement, and to the contrary, the prosecutor admitted that the State Attorney had threatened Williams (See Appendix B). The Supreme Court denied the rehearing without issuing an opinion.

Burr also argued that the trial court erred in sentencing Burr to death, over the jury's recommendation of life, and by doing so, the trial court violated the Eighth and

Fourteenth Amendments of the United States Constitution and the principles established in Tedder v. State, 322 So.2d 908 (Fla. 1975). Relying upon the rationale of Tedder and Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) Burr argued that by ignoring the jury's life recommendation which was based solely upon the jury's doubt as to Burr's guilt, the trial court violated the Eighth and Fourteenth Amendments to the United States Constitution. That is, doubt as to guilt can be a reasonable basis for recommending life, as it reflects upon the character of the offense as permitted by Lockett, supra. The Florida Supreme Court rejected that argument, holding that a jury recommendation based upon such doubts was unreasonable.

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

QUESTION

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE.

In this case, Domita Williams' testimony implicating Burr with the robbery/murder of the convenience store clerk was the critical testimony needed by the state to convict Burr. Without it, they could not have convicted him. Yet Domita Williams recanted her story when she testified the next day for the defense. She claimed that the prosecutor and especially his supervisor had threatened to jail her if she did not change her story, and significantly, the prosecutor admitted that his superior had made these threats. Also, Burr presented disinterested witnesses to corroborate Domita Williams' defense story that Burr in essence did not commit these crimes.

. . While the jury convicted Bates of the crimes, they recommended that he live. The only reason that they could have based this recommendation on was their residual doubt that Burr was guilty. Neither the trial court or the Florida Supreme Court found anything to mitigate a death sentence, and accordingly the court imposed and the Florida Supreme Court affirmed a sentence of death for Burr.

In affirming this sentence, the Florida Supreme Court rejected Burr's argument that any residual or lingering doubt the jury might have concerning Burr's guilt could serve to mitigate a death sentence. That court rejected, as a matter of law, doubt as to guilt as a legitimate sentencing consideration for the jury or judge to consider.

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. See, e.g., Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978).

Id. at 1054.

By so holding, the Florida Supreme Court has said, as a matter of law, that any evidence or argument presented during the penalty phase of the trial of a person convicted of first degree murder is irrelevant, and any life recommendation based upon such doubt is unreasonable. The further implication is that if the trial judge has any doubt as to defendant's

guilt, that belief is also irrelevant, and unless other mitigating evidence is present, the sentencer must impose a death sentence (presuming at least one aggravating factor is also present and there is no other mitigation). State v. Dixon, 283 So.2d 1 (Fla. 1972).

This holding clearly conflicts with this Court's holdings in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), and it presents a significant and important issue in the proper administration of Florida's Death Penalty Statute. Section 921.141, Florida Statutes (1981). It also has important ramifications for states which have enacted different procedures for imposing sentences of death. If the Florida Supreme Court is correct then no sentencer, whether it is the trial court or the jury, can consider doubt as to guilt as a mitigating factor or recommend or impose a life sentence based upon such a consideration.

In Lockett v. Ohio, supra, a plurality of this Court said:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (footnotes omitted).

A majority of this Court applied the Lockett holding in Eddings v. Oklahoma, supra. In that case, the trial court refused, as a matter of law, to consider Eddings' violent background as a mitigating factor. The Oklahoma Court of Criminal Appeals affirmed, saying the evidence was irrelevant because it did not tend to provide a legal excuse from criminal responsibility. Id. at 113. This Court rejected that limitation:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in Lockett. Just as the State may not

> by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 114-115 (footnotes omitted).

The Florida Supreme Court, in similar fashion, has said that doubt as to guilt is irrelevant. In contrast to Eddings which focused upon the defendant's character, this case focused upon the character of the offense. That is, doubt as to guilt, if a relevant consideration, reflects most strongly upon the characteristics of the offense and the fundamental ambiguity surrounding the facts so that the jury legitimately may want to provide a safety valve to preclude the real possibility of executing an innocent man.

Contrary to the Florida Supreme Court's holding, several justices of this Court have said or suggested that doubt as to guilt not only is relevant in considering sentencing a person to death, but it can be the preimminent reason to preclude imposition of the death sentence.

In Eddings, supra, Justice O'Connor, in her concurring opinion, said:

> Because sentences of death are "qualitatively different" from prison sentences, Woodson v. North Carolina, 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Id. at 118 (emphasis supplied).

In Spaziano v. Florida, 468 U.S.__, 82 L.Ed. 2d 340, 104 S.Ct.__ (1904) Justice Stevens, joined by Justices

Brennan and Marshall, said:

> While the crime for which petitioner was convicted was quite horrible, the case against him was rather weak, resting as it did on the largely uncorroborated testimony of a drug addict who said that petitioner had bragged to him of having killed a number of women, and had led him to the victim's body. It may well be that the jury was sufficiently convinced of petitioner's guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made, coupled with evidence indicating that petitioner had suffered serious head injuries when he was 20 years old which had induced a personality change, App 35 see also Spaziano v. State, 433 So.2d 508, 512 (Fla. 1983) (McDonald, J., dissenting), that the jury concluded that a sentence of death could not be morally justified in this case.

82 L.Ed.2d at 370-371, fn. 34.

Finally, in Heiney v. Florida, __U.S.__, 83 L.Ed.2d 237, __S.Ct.__ (1984) Justices Brennan and Marshall dissented from this Court's denial of certiorari. The issue presented in Heiney is precisely the same issue that is presented in this case.

> This Court, in Lockett and then more decisively in Eddings, held that any aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certinaly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death, is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

83 L.Ed.2d at 238 (emphasis in original).[2]

Consequently, the Florida Supreme Court has rejected, as a matter of law, what several members of this Court have said was a relevant sentencing consideration, doubt as to guilt.

Other federal courts have accepted doubt as to guilt as a reasonable basis for providing relief to a defendant. In Smith v. Balkcom, 660 F.2d 573 (CA 5 1981), the Fifth Circuit said:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.
>
> The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the defendant, for the jury entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death.

Id. at 580-581 (emphasis in original).

Similarly, the Eleventh Circuit has repeatedly acknowledged

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[2] While this Court did not grant certiorari in Heiney, the reason may be attributed to the fact that the Florida Supreme Court did not address that issue in its opinion. Consequently, this Court may have been unsure of what the Florida Court would do if the issue was clearly and unambiguously presented to them. Whatever doubts this Court may have had in that regard, this case clearly indicates the Florida Supreme Court's position.

that doubt as to guilt can be a legitimate defense strategy during the penalty phase of a jury trial.

> Washington [Strickland v. Washington, __U.S.__, 80 L.Ed.2d 674, 104 S.Ct.__ (1984)] was a case of clear guilt based on confessions and pleas of guilt to three capital murder charges. King was convicted on circumstantial evidence which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and court that the ultimate penalty should not be exacted, lest a mistake may have been made.

King v. Strickland, Case No. 82-5306, CA 11, opinion filed December 3, 1984, 36 Cr.L.Rptr. 2251.

> The failure of counsel to use the statements to impeach the Johnsons may not only have affected the outcome of the quilt/innocence phase, it may have changed the outcome of the penalty trial. As we have previously noted, jurors may well vote against the imposition of the death penalty due to the existence of "whimsical doubt."
>
> * * *
>
> In this case, use of Wesley and Patricia Johnson's prior inconsistent statements might have created a whimsical doubt that would discourage the court and advisory jury from recommending the death penalty.

Smith v. Wainwright, 741 F.2d 1248, 1255 (CA 11 1984).

Finally, the Circuit Court for the District of Colombia has recognized the fear of executing innocent people:

> Without doubt, conviction of the wrong man is the greatest single injustice that can arise out of our system of criminal law. The fear that a completely innocent man may be executed or sent to the penitentiary constantly haunts not only those of us concerned with the law, but sensitive people generally. Thus the obligation to guard against this danger is obvious.

Gregory v. United States, 369 F.2d 185 (CA DC 1966).

At least one lower Florida appellate court has recognized that doubt as to guilt, at least in non-capital sentencing, can continue even after a jury has returned a guilty verdict:

> It is equally clear and convincing that to aggravate a sentence because the defendant shows "no remorse" is only acceptable if repugnant, odious and

> accompanied by a confession, either before or after the verdict. To cruelly torture a victim and admit pleasure at having done so is altogether different from professing innocence to the bitter end. How can one be expected to show remorse concurrently with the maintenance of innocence? Nor does a jury guilty verdict automatically extinguish the right to continued proclamation of blamelessness. Moreover, even if it did, defendants at sentencing could avoid aggravation by simply declaring their innocence and gratuitously expressing sorrow for the victim. Finally our supreme court has specifically ruled out lack of remorse as an aggravating factor in death penalty cases. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

Mischler v. State, 458 So.2d 37 (Fla. 4th DCA 1984).

Most significantly, in contexts other than that presented here, the Florida Supreme Court or members of that court has recognized doubt as to guilt as a legitimate consideration for defense strategy. In Alford v. State, 307 So.2d 433 (Fla. 1975) the Court said:

> Additionally, the evidence of the defendant's guilt in these crimes was particularly strong discounting the possibility of an "innocent" man being sentenced to die.

Id. at 445.

By implication, the Court would not have affirmed a death sentence if the possibility existed that an innocent man may be sentenced to die.

In dissent, Chief Justice Boyd in Riley v. State, 433 So.2d 976 (Fla. 1983) said:

> When this Court considered Riley's initial appeal and affirmed his convictions of the murders at the Sunset Bottling Company plant, where he was employed, I dissented on the ground that there waw a lack of legally sufficient, competent, substantial evidence presented at the trial to support the verdicts of guilt. Riley v. State, 366 So.2d 19, 22-23 (Fla. 1978) (Boyd, J., dissenting).
>
> When Riley's sentence of death was again before the Court on appeal following the Court's earlier remand for resentencing, I dissented from the affirmance of the sentence of death. Although I expressed no reasons for my position at that time, my preference for reducing the sentence to

> life imprisonment was based not on any principles of our capital felony sentencing law but on my continued view that Riley's guilt had not been adequately proven at his trial. Riley v. State, 413 So.2d 1173, 1175 (Fla.); (Boyd, J., dissenting), cert.denied, __ U.S. __, 103 S.Ct. 317, 74 L.Ed. 2d 294 (1982).

Clearly, although the Chief Justice could not convince the rest of the Court concerning the sufficiency of the evidence at the guilt phase, he nevertheless believed that its weakness should mitigate a death sentence.

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), Straight attacked the effectiveness of his trial counsel for failing to develop and present evidence of his unstable mental condition at the time of the murder and of his subsequent feelings of remorse for that crime. Rejecting this attack, the Florida Supreme Court noted that trial counsel's strategy during the sentencing phase was to maintain his innocence, just as he had maintained it during the guilt phase. The Court further said:

> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally demanding to the integrity of his client's case. Therefore, we find this argument to be without merit.

For counsel not to be ineffective at the sentencing phase, the Court had to recognize that the weakness of the evidence was a legitimate defense strategy. If the Court did not so recognize, then Straight's attorney had to be ineffective because he argued in mitigation a theory not recognized by law.

Most disturbing, however, is the manner in which the Florida Supreme Court handled Richardson v. State, 437 So.2d 1091 (Fla. 1983). In that case, the only mitigation present was the doubt that Richardson committed the murder -

precisely the same issue raised here (See Appendix G, H). Richardson, like Burr, had several aggravating factors to justify imposition of death, and neither men had anything to mitigate these sentences other than the weakness of the evidence in their cases. Also, in both cases the jury returned an advisory verdict of life which the trial court in both cases ignored. Yet, on appeal, the Florida Supreme Court without any discussion reduced Richardson's death sentence to life while affirming Burr's sentence of death. They reduced Richardson's death sentence to life in prison despite the fact that in Buford v. State, 403 So.2d 943 (Fla. 1981), cert.denied, 455 U.S. 1163 (1982) the court had earlier rejected the issue Richardson and Burr raised:

> A defendant cannot be "a little bit guilt." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proven beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy.

Id. at 953.

The court affirmed Burr's death sentence despite his reliance upon Richardson, and at oral argument both the state and counsel for Burr asked this Court to reconcile Burr with Richardson. It refused to do so, and relying upon Buford (which it could have used in Richardson, but did not), it rejected Burr's doubt as to guilt argument.

The Florida Supreme Court thus can do what it wants to do. If they want to reverse a death sentence, they simply do as they did in Richardson, and if they want to affirm, they cite Burr.

What makes the Richardson-Burr contradiction particularly galling is this Court's unwitting reliance upon Richardson as evidence of the Florida Supreme Court's strict adherence to the standard it adopted for evaluating the trial court's override of a jury recommendation of life.[3]

---

[3] See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

> We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Miller v. State, 332 So.2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.

Spaziano v. Florida, 468 U.S.__, 82 L.Ed.2d 340, 356, 104 S.Ct.__ (1984).

This Court has seen nothing because the Florida Supreme Court has hidden its arbitrary action. It did not explain why it reduced Richardson's death sentence to life, yet when it affirmed Burr's death sentence on exactly the same issue as raised in Richardson, it cited Buford. No legal reasons exist for the distinction between Richardson and Burr, yet an obvious distinction does exist. Richardson gets life while Burr gets death. Yet this distinction is as arbitrary as being struck by lightening. Furman v. Georgia, 408 U.S. 238 (1972).

The drafters of the Model Penal Code similarly have recognized the relevance of doubt as to guilt as the legitimate mitigating factor. In fact, they believe this factor was so significant that if it was present, it precluded imposition of a death sentence.

> § 210.6 Sentence of Death for Murder; Further Proceedings to Determine Sentence
>
> (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

Model Penal Code, Section 201.6(1) (proposed official draft, 1962).

Consequently, the Florida Supreme Court's decision that doubt as to guilt cannot be considered as relevant evidence in mitigation ignores what this Court said in Lockett and Eddings, supra, what several members of this Court have said, what other courts have said, what itself has said or done, and what other thinkers on the subject of capital punishment have recommended. The conflict is clear.

The facts in this case also are very clear. The state's case against Burr stands or falls upon Domita Williams. The state presented some corroborating evidence, of course, but without Williams' testimony implicating Burr, this evidence amounted to a small rubble of disconnected facts.

The defense story, of course, was immensely strengthened by Williams' recantation. What makes her defense version particularly compelling and hence more troublesome is the undenied threats made by the State Attorney on the day of trial for her to change her testimony. The prosecution never denied that his superior threatened Williams with jail.

> Q [By Mr. Meggs, the prosecutor] Did Mr. Modesitt come there and talk to you?
>
> A. Yes, he did.
>
> Q. Did he apologize to you?
>
> A. Yes, but not the way I wanted to hear it.
>
> Q. He didn't threaten you anymore, though, did he?
>
> A. He mentioned something about crime.

(T-1305) (emphasis supplied).

Also significant was the additional testimony of relatives and disinterested witnesses who made Williams'

prosecution story a virtual impossibility.

Thus, the facts here present a troubling case, and they certainly justify a jury's recommendation of life in light of Domita Williams' mutually exclusive statements and the evidence corroborating both versions.

This issue involves a substantial question in the administration of the states' various death penalty statutes. If doubt as to guilt is not a relevant consideration at sentencing, it will certainly significantly increase the likelihood that at sometime, somewhere, an innocent man will be executed. If doubt as to guilt is not a legitimate factor, what is the innocent man wrongly convicted to say? "I was drunk" when he wasn't. "I was crazy" when he isn't. "I am sorry" when he isn't because he has not done anything wrong.

The Florida Supreme Court's ruling in this case has significantly increased the likelihood that an innocent man may someday be executed by precluding, as a matter of law, the only viable defense to mitigate a sentence of death that he may have.

CONCLUSION

WHEREFORE, petitioner respectfully requests this Honorable Court to grant this petition for writ of certiorari, or, in the alternative, summarily reverse petitioner's death sentence for the reasons discussed in this petition.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

STEVEN L. BOLOTIN
Assistant Public Defender

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE LEWIS BURR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR OF THIS COURT)

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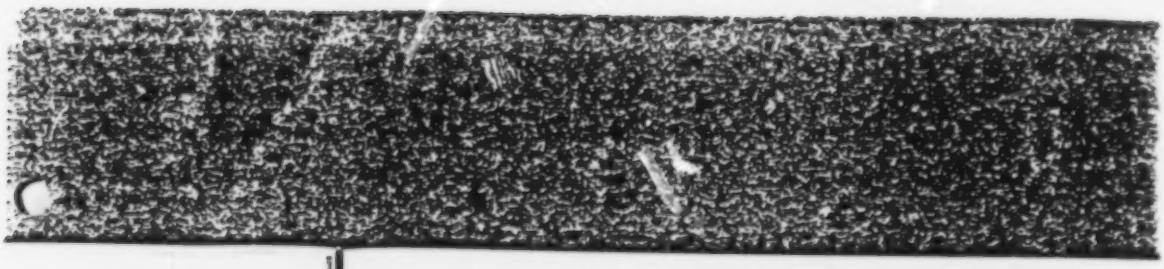
APPENDIX A



t front of the victim's chest, one
k, one to the abdomen, and two to
vrist. At some point during or
ly following the stabbing, Medi-
loose cloth gag in the victim's
According to the medical examin-
tim took ten to thirty minutes to
experienced considera[illegible]ain.
Preston v. State, 444 S[illegible]939
(victim's throat slashed, sur-
circumstances can support find-
as, atrocious, or cruel); *Peary v.*
2 So.2d 200 (Fla.1983) (stabbing
rt finding heinous, atrocious, or
aggravation). The record shows
na had an obsession for cars and
mendous desire to own his own
record supports the conclusion of
judge that he killed the victim,
new, to obtain her car. He later
[illegible]ll it to raise bond money for
ello. *Compare Middleton v.*
6 So.2d 548 (Fla.1982), *cert. de-*
U.S. ——, 103 S.Ct. 3573, 77
.413 (1983) (stealing victim's car
ls and selling pistols supports
r pecuniary gain).

has a behavorial problem. He
that he had been hospitalized for
roblems in Cuba. His actions ap-
e impulsive at times. The trial
naidered and weighed both the
and nonstatutory mitigating evi-
I found that Medina had no signif-
or criminal history. The trial
o found, however, that the non-
mitigating evidence was entitled
weight and that the aggravating
nces outweighed the mitigating
Compare Foster v. State, 369
(Fla.), *cert. denied*, 444 U.S. 885,
178, 62 L.Ed.2d 116 (1979) (death
affirmed for stabbing 'eath and
ven though defendant had exten-
ry of mental illness).

I that no reversible error occurred
[illegible]ial and that competent, sub-
[illegible]ce supports the convictions
nces. We therefore affirm those
s and sentences.

ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Charlie Lewis BURR, Appellant,

v.

STATE of Florida, Appellee.

No. 62365.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied April 26, 1985.

Defendant was convicted in the Circuit Court in and for Leon County, Charles E. Miner, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Boyd, C.J., held that: (1) fact that State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to support conviction; (2) there was no evidence that State witness' testimony was made under coercion or duress; (3) evidence of collateral crimes was relevant to establish identity and intent; and (4) trial judge did not err in imposing death sentence over jury's recommendation of life imprisonment.

Affirmed.

Overton and McDonald, JJ., concurred in conviction, but dissented from sentence.

1. Grand Jury ⇐21

Defendant's showing that very few blacks had served as grand jury foremen in county did not constitute a prima facie case of racial discrimination in grand jury foreman selection.

2. Homicide ⇐253(1)

That State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to convict defendant of first-degree murder.

3. Criminal Law ⇐706(2)

Where witness, who testified against defendant only after being advised by State attorney of consequences of committing perjury and of importance of telling the truth, admitted on cross-examination that State attorney had neither threatened her nor behaved in a hostile manner, and where testimony implicating defendant was consistent with witness' original statements to her friends and police, witness' testimony was not the product of coercion or duress.

4. Criminal Law ⇐369.15, 371(4)

In prosecution for first-degree murder of store clerk during convenience store robbery, evidence of collateral crimes, namely, the testimony of other convenience store clerks to effect that defendant had robbed them, was relevant and admissible to establish identity and intent.

5. Criminal Law ⇐1037.1(2)

Defendant failed to preserve for appellate review issue of whether trial court erred by failing to control State's inflammatory and prejudicial argument, where no objections were made with respect to the comments.

6. Criminal Law ⇐723(4)

Prosecutor's statement that there were people who were scared and that defendant "executes" people was not so unduly inflammatory or prejudicial as to warrant mistrial.

7. Criminal Law ⇐665(4)

Where it was shown that rebuttal witness' testimony was not substantially different from what it would have been had she not heard testimony of witness she was rebutting, trial court did not abuse its discretion in allowing rebuttal witness to testify.

8. Homicide ⇐354

Evidence supported findings that murder of convenience store clerk during robbery was committed for purpose of avoid-

ing lawful arrest and in a cold, calculated and premeditated manner without pretense of any moral or legal justification, both aggravating circumstances used to support death sentence. West's F.S.A. § 921.-141(5)(e), (i).

9. Homicide ⇐354

Trial judge did not err in imposing death sentence over jury's recommendation of life in prosecution for first-degree murder of convenience store clerk during robbery where there were several aggravating circumstances and no mitigating circumstances and there was no reasonable basis for jury to recommend life.

David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, for appellee.

BOYD, Chief Justice.

This case is before us on appeal of a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Charlie Burr was indicted for the first-degree murder of a store clerk during a robbery at a convenience store near Tallahassee. At the trial the state's key witness was Domita Williams who testified that she was with appellant the morning of the murder. She testified that they drove to the store where she bought a cheeseburger and candy bar and that when she returned to the car appellant entered the store. She said that she heard a shot and then appellant came out. According to her testimony, they then drove to an apartment where appellant was staying and she told Katrina Jackson and Tammy Footman about the incident. Upon being called as a witness, Katrina Jackson at first denied Williams had told her anything, but after being declared a hostile witness and upon cross-examination by the state, she corroborated Williams' testimony. The state then presented evidence of collateral crimes. Three convenience store clerks from Brevard County testified that appellant robbed and shot them in three separate incidents within a period of nineteen days after the murder charged in the instant case.

The defense called Domita Williams as its main witness. She recanted her earlier testimony and claimed that she was not with appellant the morning of the murder.

In rebuttal the state proffered Tammy Footman's testimony; she had heard the previous day's testimony where Williams had inculpated appellant, but had not heard Williams' recantation. Over appellant's objections, Footman was allowed to testify concerning Williams' statements to her to the effect that she was present at the murder. An investigator was also allowed to testify about Williams' statements to him, which were consistent with her original testimony. An interview of Williams, recorded on audiotape, was played for the jury.

The jury found appellant guilty of first-degree murder and robbery with a firearm. At the sentencing hearing the state presented no additional evidence. The defense presented several witnesses who testified that appellant was a good man and had been raised a Christian. The jury recommended a sentence of life imprisonment.

Notwithstanding the jury's recommendation of a life sentence, the trial judge sentenced appellant to death. In support of his sentence, the judge found as aggravating circumstances that the murder was committed during the course of a robbery, that it was committed to avoid or prevent a lawful arrest, and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The judge found nothing in mitigation.

[1] Appellant's first argument on appeal is that he was denied due process of law because the selection of grand jury foremen in Leon County is racially discriminatory. Appellant moved to dismiss the indictment, claiming he made a prima facie case of racial discrimination by showing

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Appellant moved to dismiss the
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racial discrimination by showing
that very few blacks have served as grand jury foremen in Leon County. We rejected a similar argument in *Andrews v. State*, 443 So.2d 78 (Fla.1983), and therefore hold that the court did not err in denying the motion to dismiss.

[2] Appellant's next argument is that there is insufficient competent evidence to support affirmance of his conviction and that in the interest of justice he should be granted a new trial. *See* Fla.R.App.P. 9.140(f). Appellant concedes that there is legally sufficient evidence, in the form of Ms. Williams' testimony, to support his conviction, but that such evidence is not competent since Ms. Williams recanted her earlier incriminating testimony. He argues that a witness cannot be considered credible when giving one story and incredible when giving another. The logical conclusion of appellant's argument is that juries must believe all or none of a particular witness's testimony. The fallacy of this conclusion is self-evident. Obviously, a witness can tell the truth about some matters and lie about others. In this case, to reach a verdict of guilty, the jury had to believe Ms. Williams' original testimony and disbelieve her recantation. It is not this Court's function to reweigh the evidence, but only to ensure its legal sufficiency. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The evidence was legally sufficient, and we do not find that the interests of justice require a new trial in this case.

[3] Appellant also argues that the conviction should be reversed in the interest of justice because Ms. Williams originally testified under duress. The record shows that on the day of the trial Ms. Williams indicated for the first time that her testimony would not implicate appellant. The state attorney then conferred with her and advised her of the consequences of committing perjury and of the importance of telling the truth. After this conversation, Ms. Williams testified as originally expected. During her recantation she explained that she had changed her mind and agreed to testify against appellant because the state attorney was furious with her and had threatened to put her in jail. However, on cross-examination by the state, Ms. Williams testified that the state attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. This admission and the fact that her testimony implicating appellant was consistent with her original statements to her friends and the police belie appellant's contention that Ms. Williams' testimony was the product of coercion or duress.

[4] Appellant's next point on appeal is that the trial court erred by allowing into evidence the testimony of the other convenience store clerks to the effect that he had robbed them. Appellant contends that their testimony was not relevant to any issue of material fact. The state responds that such evidence was relevant to show identity, by showing the similarities between those shootings and this one, and to prove appellant had the intent to kill the victim. The state attempted to prove this latter element through the testimony of one of the other convenience store clerks who testified that appellant told him he was going to kill him.

We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla.Stat. (1981). Since this evidence did not become a major feature of appellant's trial, appellant was not improperly prejudiced by its admission. *See Williams v. State*, 117 So.2d 473 (Fla.1960).

[5] Appellant next argues that the court erred by failing to control the state's inflammatory and prejudicial argument. However, no objections were made with respect to the comments appellant now complains about, except for one of them. We therefore find that this point has not been properly preserved with respect to most of the comments appellant now claims

were improper. *See e.g. Steinhorst v. State*, 412 So.2d 332 (Fla.1982).

[6] The one comment appellant did object to was the prosecutor's statements that there were people who were scared in this case and that appellant "executes" people. The trial judge ruled that such statements were a fair comment upon the evidence and denied appellant's motion for a mistrial. We do not find these statements to have been so unduly inflammatory or prejudicial as to warrant a mistrial. *See Blair v. State*, 406 So.2d 1103 (Fla. 1981).

[7] Appellant's final argument with respect to the validity of his conviction is that the trial court erred in allowing a witness to testify in violation of the rule of sequestration. After Ms. Williams recanted and testified for the defense, the state called Tammy Footman as a rebuttal witness. Appellant objected on the grounds that Ms. Footman had been present during Ms. Williams' original testimony. The state proffered Ms. Footman's testimony, and the trial court ruled that only that part of her testimony that was consistent with her previous statement could be admitted. Because it was thus shown that Ms. Footman's testimony was not substantially different from what it would have been had she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify. *Steinhorst v. State; Dumas v. State*, 350 So.2d 464 (Fla. 1977).

[8] With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. *See* § 921.141(5)(e), (i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

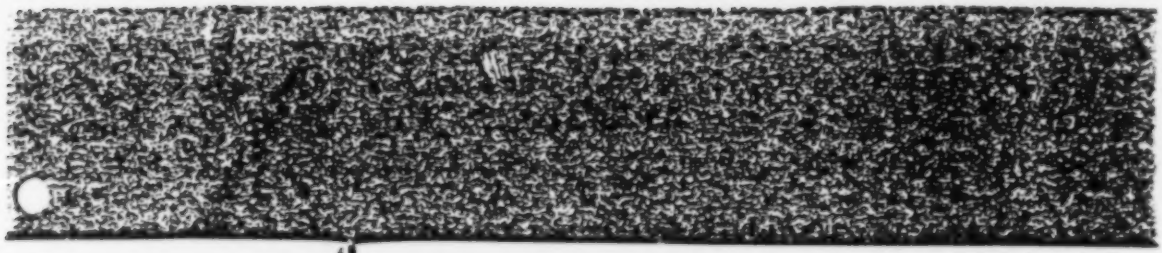
[9] Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. *See, e.g., Stevens v. State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

The aggravating circumstances adequately established and properly found by the sentencing court were:

(1) that the murder was committed in the course of a robbery;

(2) that the murder was committed for the purpose of avoiding arrest and prosecution;

(3) that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.



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rt. denied, 454 U.S. 1163, 102 S.C.
L.Ed.2d 319 (1982). There were
aggravating circumstances and no
g circumstances, so death was to
umed the appropriate penalty.
Dixon, 283 So.2d 1 (Fla.1973), *cert.*
416 U.S. 943, 94 S.Ct. 1950, 40
295 (1974). Moreover, there was
onable basis, discernible from the
for the jury to recommend life,
e the judge was justified in over-
he jury's recommendation. *See,*
ens v. State, 419 So.2d 1058 (Fla.
rt. denied, 459 U.S. 1228, 103 S.Ct.
L.Ed.2d 469 (1983); *Hoy v. State*,
d 826 (Fla.1977), *cert. denied*, 439
0, 99 S.Ct. 293, 58 L.Ed.2d 265

aggravating circumstances ade-
established and properly found by
encing court were:

that the murder was committed in
urse of a robbery;

that the murder was committed for
rpose of avoiding arrest and prose-

this the murder was committed in
calculated, and premeditated man-
ithout pretense of moral or legal
cation.

There were no mitigating circumstances. A sentence of death in this case is consistent with capital sentencing approved by this Court in similar cases.

The judgment of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but dissent from the sentence.

In re ESTATE OF Holly E. GAINER, Deceased.

Carol GAINER, Individually and as Personal Representative of the Estate of Holly E. Gainer, Appellant,

v.

Dorothy DORAN and Mary Adams, Appellees.

No. 64,874.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied May 1, 1985.

Appeal was taken from judgment of the Circuit Court, Brevard County, Clarence T. Johnson, Jr., J., holding that testator's assets in federal savings and loan association account belonged to surviving joint holder. The District Court of Appeal, 443 So.2d 473, held that Savings Association Act unconstitutionally denied equal protection to beneficiaries, and personal representative appealed. The Supreme Court, Alderman, J., held that Savings Association Act's conclusive presumption that, absent fraud, joint accounts vest i survivor did not violate equal protectio

Decision of District Court of Appe reversed in part and cause remanded.

Ehrlich, J., filed dissenting opinio

1. Joint Tenancy ⇐6

Statute creating conclusive presumption that, absent fraud, joint accounts hel in federal savings and loan association would vest in survivor was intended t provide certainty as to nature of joint ac count with right of survivorship which i encompassed. West's F.S.A. § 665. 063(1)(a).

2. Joint Tenancy ⇐6

Legislature had authority to enac statute creating conclusive presumptio that, absent fraud, joint accounts in federa savings and loan associations would vest i survivor. West's F.S.A. § 665.063(1)(a).

3. Joint Tenancy ⇐2

For purposes of equal protection analysis, classifications established by Savings Association Act and banking code concerning entitlement to assets held in joint accounts were depositors in federal savings and loan associations on the one hand and depositors in state banks, rather than testamentary beneficiaries, on the other hand. F.S.1979, §§ 659.291, 665.271; West's F.S.A. § 665.063(1)(a).

4. Constitutional Law ⇐213.1(1)

Classification within context of equal protection clause is the grouping of things because they agree with one another in certain particulars and differ from other things in those particulars. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

5. Constitutional Law ⇐48(6)

Party who challenges classification within context of equal protection clause has burden of proving that it does not rest upon reasonable basis. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 2.

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CHARLIE LEWIS BURR,	:	
Appellant,	:	
v.	:	CASE NO. 62,365
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

Pursuant to Rule 9.330, Florida Rules of Appellate Procedure, the appellant, Charlie Burr, respectfully asks this Honorable Court to rehear his case as it has either overlooked or misapprehended several points of law or fact. As grounds for this motion, he says:

A. THE TIBBS ARGUMENT

On appeal, Burr argued that there was not substantial, competent evidence of Burr's guilt. Specifically, he argued that Domita Williams' testimony was not competent because she was not a competent witness. As the trial court admitted and this Court cannot deny, Williams lied on the witness stand (T-1265,1327). Significantly, she lied not just on portions of her story, as this Court's opinion inaccurately suggests, but her entire story was a lie. Thus, due to her complete inability to tell the truth, she was an incompetent witness. Bell v. State, 93 So.2d 575 (Fla. 1957). This Court overlooked this argument in its opinion, and Burr asks it to address it on rehearing.

B. THE STATE ATTORNEY'S THREATS

On page three and four of its opinion, this Court said:

> However, on cross-examination by the state, Ms. Williams testified that the State Attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth.

Counsel, however, cannot find any testimony that DON MODESITT, the State Attorney, had merely advised Domita Williams of the importance of telling the truth. To the contrary, DON MODESITT threatened her and the prosecutor, WILLIE MEGGS, never challenged that fact, and explicitly conceded it (T-1305). On cross-examination, what Domita Williams said was that WILLIE MEGGS, the prosecutor (not DON MODESITT, the State Attorney), had not threatened her (T-1305), and the most the prosecutor could get Williams to admit was that DON MODESITT had stopped threatening her.

> Q Did Mr. Modesitt come there and talk to you?
>
> A Yes, he did.
>
> Q Did he apologize to you?
>
> A Yes, but not the way I wanted to hear it.
>
> Q He didn't threaten you anymore, though, did he?
>
> A He mentioned something about crime.

(T-1305)(emphasis supplied).

The unrebutted evidence clearly shows that the State Attorney threatened Williams, and the prosecutor never challenged that fact. There was absolutely no evidence that DON MODESITT "merely emphasized the importance of telling the truth." To the contrary, what is absolutely clear and unrebutted is the fact that DON MODESITT called Domita Williams a liar and a bitch (T-1283) and was going to put her in jail (T-1284). This Court's statements about the State Attorney makes sense only if this Court has confused what Domita Williams said concerning WILLIE MEGGS as also applying to DON MODESITT. Williams, however, on direct (T-1283-1284) and cross-examination (T-1305) insisted that DON MODESITT had threatened her.

Moreover, this Court has overlooked the extensive and unchallenged testimony of the several customers of the

Suwannee Swifty who corroborated Domita Williams' defense testimony (T-1078,1086,1106,1109). Likewise, Katherine Haygood, Williams' work supervisor, essentially said Williams told her she did not know anything about the robbery (T-1137-1139). This Court has also overlooked the testimony of Williams' mother and her other relatives who said Williams could not have been with Burr at the time she said Burr committed the murder (T-1157,1195).

Burr, therefore, asks this Court to reconsider its opinion on this issue in light of the facts it has overlooked or misapprehended.

C. THE WILLIAMS RULE EVIDENCE

On page four of its opinion, this Court said:

> We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. (cites omitted.)

What this Court has misapprehended is:

1. Burr's intent and identity were not at issue in this trial. The prosecutor, in fact, did not believe he had to argue intent as it was so clear (T-1417). Moreover, defense counsel at trial never cross-examined Domita Williams about that elemen[illegible] (T-846-861), and on appeal, appellate counsel has not cha[illegible]nged the legitimacy of the trial court's findings regarding the aggravating factor that the murder was committed in a cold, calculated, and premeditated manner. Likewise, neither trial or appellate counsel challenged the identity of Burr as the killer. Consequently, this Court has overlooked Marion v. State, 287 So.2d 419 (Fla. 4th DCA 1974), Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974), and Davis v. State, 376 So.2d 1198 (Fla. 2d DCA 1979) which hold that collateral crimes evidence is inadmissible to prove issues uncontested by the defense.

2. Likewise, this Court has overlooked Drake v. State, 400 So.2d 1217 (Fla. 1981) in which this Court said that the

collateral crimes evidence sought to be admitted must be so unusual or special as to point to the defendant as the perpetrator of the crime for which he is on trial. There are no pervasive similarities in this case with the Brevard County offenses, and what similarities exist here are so general that they do not meet the Drake test for admissibility. Moreover, the significant dissimilarities between the Brevard County robberies and this murder destroy any relevance that they had to this case.

More disturbing, however, is the fact that this Court has overlooked the acquittal in one of the Williams Rule cases used against Burr at his trial. Under Perkins v. State, 349 So.2d 161 (Fla. 1977), the state cannot use collateral crime evidence, for which a defendant has been acquitted, in a subsequent trial. In this case the acquittal was subsequent to the murder conviction in this case, yet Burr can perceive no meaningful distinction between this case and Perkins, and he asks this Court to reconsider its opinion concerning the admissibility of the Williams Rule evidence in this case.

D. THE AGGRAVATING FACTORS

On page five of its opinion this Court said:

> With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. See § 921.141(5)(e)(i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

Burr initially points out that this Court has overlooked the fact that the trial court made no findings of fact as to his conclusion that this murder was committed in a "cold, calculated, and premeditated manner..." but merely posed a rhetorical question.

> The murder of Steven Harty was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Of this, can there be any doubt?

(T-320).

By supplying the facts to support this finding that the trial court should have found, this Court has misapprehended its function. See Mann v. State, 420 So.2d 578 (Fla. 1982).

Moreover, this Court has overlooked the fact that the Williams Rule evidence which the trial court used to find that the murder was committed to avoid lawful arrest occurred after the murder. That is, Burr committed the murder before the other shootings in which no one died, a fact Burr clearly knew when he left at least one of the stores (T-993,1054).

Finally, although Burr raised the issue of the doubling of the aggravating factors "to avoid lawful arrest..." and "cold, calculated, and premeditated..." this Court overlooked treating that issue in its opinion.

E. DOUBT AS TO GUILT AS A REASONABLE BASIS FOR A LIFE RECOMMENDATION.

On page six of its opinion, this Court said:

> However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982).

What this Court has overlooked is that it or members of this Court have recognized, in other cases, that the weakness of the evidence can be a legitimate basis for a

life recommendation. In Alford v. State, 307 So.2d 433 (Fla. 1975) this Court said:

> Additionally, the evidence of the defendant's guilt in these crimes was particularly strong, discounting the possibility of an "innocent" man being sentenced to die.

Id. at 445.

By implication, this Court would not have affirmed a death sentence if the possibility existed that an innocent man may be sentenced to die.

In dissent, Chief Justice Boyd in Riley v. State, 433 So.2d 976 (Fla. 1983) said:

> When this Court considered Riley's initial appeal and affirmed his convictions of the murders at the Sunset Bottling Company plant, where he was employed, I dissented on the ground that there was a lack of legally sufficient, competent, substantial evidence presented at the trial to support the verdicts of guilt. Riley v. State, 366 So.2d 19, 22-23 (Fla. 1978) (Boyd, J., dissenting).
>
> When Riley's sentence of death was again before the Court on appeal following the Court's earlier remand for resentencing, I dissented from the affirmance of the sentence of death. Although I expressed no reasons for my position at that time, my preference for reducing the sentence to life imprisonment was based not on any principles of our capital felony sentencing law but on my continued view that Riley's guilt had not been adequately proven at his trial. Riley v. State, 413 So.2d 1173, 1175 (Fla.) (Boyd, J., dissenting), cert.denied, __U.S.__, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

Clearly, although the Chief Justice could not convince the rest of the Court concerning the sufficiency of the evidence at the guilt phase, he nevertheless believed that its weakness should mitigate a death sentence.

In Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), Straight attacked the effectiveness of his trial counsel for failing to develop and present evidence of his unstable mental condition at the time of the murder and his subsequent

feelings of remorse for that crime. Rejecting this attack, this Court noted that trial counsel's strategy during the sentencing phase was to maintain his innocence, just as he had maintained it during the guilt phase. This Court further said:

> However, a defendant through counsel may waive the opportunity to make such an inconsistent presentation on the question of sentence after maintaining his innocence at the guilt phase of the trial. For an attorney to take such a position on behalf of his client does not establish that representation was ineffective. Defense counsel viewed evidence of mitigating circumstances as fundamentally damaging to the integrity of his client's case. Therefore, we find this argument to be without merit.

For counsel not to be ineffective at the sentencing phase, this Court had to recognize that the weakness of the evidence was a legitimate defense strategy. If this Court did not so recognize, then Straight's attorney had to be ineffective because he argued in mitigation a theory not recognized by law.

Finally, in his reply brief, Burr cited this Court's opinion in Richardson v. State, __So.2d__ (Fla. 1983) in which this Court reduced Richardson's death sentence to life imprisonment because of the weakness of the evidence of guilt. While this Court did not explicitly say this was the reason for doing so (in fact the opinion gives no reason for reducing the death sentence) the briefs filed in that case clearly demonstrated that the only basis for the jury's life recommendation was the weakness of the evidence as to Richardson's guilt. At oral argument in this case, counsel pointed this out to this Court and he received no challenge to that claim. Moreover, the state also at oral arguments acknowledged the problem presented by Richardson and asked this Court to resolve the conflict between Richardson and this case.

Consequently, this Court has overlooked Richardson, Riley, Alford, and Straight, and Burr respectfully asks this Court to reconcile its opinion in this case with the cases cited.

Charlie Burr, therefore, respectfully asks this Honorable Court to rehear his case.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee, this 1st day of March, 1985.

DAVID A. DAVIS

APPENDIX C

RECEIVED
MAY 1 1985
DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

IN THE SUPREME COURT OF FLORIDA

FRIDAY, APRIL 26, 1985

CHARLIE LEWIS BURR, **

Appellant, ** CASE NO. 62,365

vs. ** Circuit Court Case No. 81-1831 (Leon County)

STATE OF FLORIDA, **

Appellee. **

Received
4-30-1985
Florida Attorney General

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD C.J., ALDERMAN, EHRLICH and SHAW, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judg

David A. Davis, Esquire
Gregory G. Costas, Esquire

APPENDIX D

84 6982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Mr. Charlie Lewis Burr, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, and by hand delivery to Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Mr. Gregory Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301, on this 14 day of June, 1985.

David A. Davis

DAVID A. DAVIS

ORIGINAL

Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-6982

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

RECEIVED
JUL 26 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLIE L. BURR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

(904) 488-0290

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Respondent objects to Petitioner's statement of the question presented as being predicated upon speculation and misinterpretation, and consequently restates said question as follows:

> WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

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QUESTION PRESENTED:	
WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d. 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).	9
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PRELIMINARY STATEMENT

Charlie Lewis Burr, the criminal defendant and appellant below will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below will be referred to herein as Respondent. Attached hereto is an appendix containing the opinion of the Florida Supreme Court and other pertinent documents. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s). Citations to the petition for writ of certiorari will be indicated parenthetically as "P" with the appropriate page number(s).

OPINION BELOW

Petitioner seeks review of the Florida Supreme Court's opinion affirming his judgment and sentence of death. The opinion is reported as Burr v. State, 466 So.2d 1051 (Fla. 1985) (A 1-5).

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. § 1257(3). The judgment below was entered on February 14, 1985, and Petitioner's timely motion for rehearing was denied on April 26, 1985 (A 1,6). This Court has jurisdiction only to the extent that it finds a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant case involves a death sentence imposed pursuant to Florida Statutes § 921.141 (1983). While Petitioner asserts that the issue raised herein presents a constitutional question under the Eighth and Fourteenth Amendments to the United States Constitution, Respondent contends the contrary.

STATEMENT OF THE CASE

Citations to the sequentially numbered record on appeal will be indicated parenthetically as "R" with the appropriate page number(s).

Respondent objects to Petitioner's statement that "[o]ther witnesses testified for the defense, bolstering Williams' defense testimony," (P 1), as being argumentative and conclusory.

Petitioner's representation that Florida Supreme Court Justices McDonald and Overton consented to the court's affirmance of the death sentence without filing an opinion is incorrect (P 2). Justices McDonald and Overton concurred in the conviction, but dissented from the sentence without opinion. Burr v. State, 466 So.2d 1051,1055 (Fla. 1985).

Respondent objects to Petitioner's statement that "[t]he Supreme Court expressly rejected, as a matter of law, doubt as to guilt as a reasonable basis for recommending and imposing a life sentence," (P 2), as being argumentative and conclusory. For the same reasons, Respondent objects to Petitioner's statement to the effect that the ambiguity in Domita Williams' testimony was sufficient to raise some doubt of Burr's guilt sufficient to prevent the trial court from imposing death (P 3).

Respondent objects to Petitioner's statement that "[t]he prosecutor admitted what Williams said about what happened on the morning of trial was true". (P 8 n.1). The record reflects that this assertion was derived from the manner in which the prosecutor phrased the questions he posed to Williams rather than from an explicit admission (R 1254,1255).

Respondent, for the purpose of resolving the issue raised herein, accepts as accurate, though incomplete, the

remainder of Petitioner's Statement of the Case (P 1-3) and Statement of the Facts (P 3-9) and therefore submits the following additional information:

Domita Williams testified that she knew the victim as "Steve" because she had stopped there before (R 834); that she and Petitioner arrived at the store "roughly around 7:00 [a.m.], a little after 7:00 [a.m.], a little before . . ." (R 834); that no one besides the clerk was in the convenience store while she and Petitioner were there and no one was in the parking lot area (R 835); that she could, in fact, see Petitioner and the victim from the car, upper part only, and, after hearing a gunshot, she looked up again and saw Petitioner, but not the victim (R 836,837; 852,853); that she was crying because "he [Petitioner] had shot Steve" and she had "never witnessed anything like that before . . ." (R 837); that Petitioner was wearing blue jeans and a "Master Red" shirt at the time (R 838) [Williams also identified State's Exhibit number one as being Petitioner's shirt (R 839)]; and that the gun imprint she noticed in Petitioner's pocket was a pistol-type handgun (R 838).

Williams further testified that after the incident at the convenience store she and Petitioner drove to an apartment where Petitioner was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tammy Footman, who were present in the apartment, what had happened at the store and what she had seen. (R 840).

Subsequent to the apartment visit, Williams was taken to work at Sunland by Petitioner and once there she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell her the truth about what happened (R 841).

Williams specifically stated that she did not drive her mother to work on August 20, 1981 and that her mother had driven her own car to work that day. (R 845). She also testified that someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true (R 845).

On cross-examination it was established that Williams was afraid of Petitioner and apparently feared for her baby. (R 856,857). Williams denied telling her mother or anyone else that she had lied in her statement to Charlie Ash and that her mother was lying about August 20, 1981. (R 858-861).

On re-direct examination Williams explained her fear of Petitioner and testified that Petitioner did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

After Domita Williams testified for the defense and recanted her previous testimony (R 1266-1286), it was revealed during cross-examination that Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwannee Swifty the morning of the robbery/murder (R 1136,1137; compare to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valerie Grant claimed they saw at the same time they saw Domita in her mother's car (R 1289); she admitted that when she gave her original statement to Charlie Ash she knew Katrine Jackson and Tammy Footman had previously given statements, but did not know the content of their statements (R 1290,1291); she couldn't explain the "cheeseburger story" away . . . how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you can get the

chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted saying no threats were made when she gave her statement (R 1295); she acknowledged that her deposition testimony (where no threats were made) was consistent with her statement (R 1296,1297); she acknowledged that her Grand Jury testimony (where no threats were made) was the same (R 1297,1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before trial (where no threats were made) and it was the same (R 1298,1299); she acknowledged that Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after [she] found out that they didn't have any evidence against [Petitioner]," that at that point she decided to "tell the truth" (R 1303-1304); that Mr. Meggs calmed her down and she agreed that her original statement was true (R 1304,1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she had received a call from defense counsel after her original trial testimony and but for that call she didn't "think" she would have returned and recanted her original testimony (R 1307); she emphasized once again that she was scared of Petitioner for herself and for her baby (R 1307,1308); and she denied ever discussing the Suwannee Swifty incident in the presence of Petitioner and Darrell Footman (R 1309; compare to R 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Petitioner's car at Williams' house between 6:30 a.m. and 7:00 a.m. August 20, 1982 (R 1335). At 7:45 a.m.

the car was gone (R 1336,1337).

Tammy Footman's testimonv was proffered because it was agreed that she had heard the previous day's testimony, but not Williams' recantation. (R 1320,1322,1323,1324,1325, 1342,1352). Petitioner's counsel suggested the proffer and at its conclusion admitted the testimony was "along the lines of her statement". (R 1325,1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior testimony and specifically stated that Williams told her the "cheeseburger story" the morning of the incident (R 1357,1358-1361).

Ray Wood testified that the ambulance was already at the Suwannee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation (R 1370-1373). He knew Williams had information after talking to Katrine Jackson and Tammy Footman, but he never told Williams what they had stated (R 1376-1378). Williams' mother was hostile (R 1374) and he got no response from her when he asked how she knew if her daughter knew something about the Suwannee Swifty incident (R 1374,1375). Ash denied ever threatening Domita Williams (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmospere of that statement (R 1382,1386). The State rested and all testimony concluded.

At the sentencing hearing, the jury witnessed an impassioned, tearful plea by Petitioner's mother that the jury advise the trial court to spare his life (R 319, See also R 451,452,455).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Respondent rejects Petitioner's reference to his argument concerning Domita Williams' testimony as being irrelevant to the manner in which the issue presented herein was raised below. Respondent concurs with Petitioner's representation concerning his presentation of his "doubt as to guilt" claim to the Florida Supreme Court, but contends that the court perceived and resolved the issue as one resting solely on state grounds, to-wit: whether "doubt as to guilt" constituted sufficient basis to conclude that the trial judge's override was improper under the Tedder test (See footnote 2, infra). The Florida Supreme Court concluded that it was not.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Implicit in Petitioner's statement of the question presented (P i) is his recognition of the fact that he must establish that the Florida Supreme Court's decision herein resolved a federal question in a manner in conflict with this Court's decisions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), as a basis for invoking this Court's certiorari jurisdiction. See Supreme Court Rules 17.1(c). Respondent submits that the allegedly offending portion of the Supreme Court's decision does not present a federal question and in any event said decision is not violative of the requirements of the Eighth and Fourteenth Amendments as set forth in Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra.

Initially, Respondent contends that Petitioner's version of the question presented, which on its face would entitle him to review if answered affirmatively, misses the mark because it is erroneously predicated upon premises fallaciously derived from speculation on the one hand, and misinterpretation on the other. Specifically, Petitioner first asserts that the jury's life recommendation "was based solely upon their doubt as to Burr's guilt." (P i).

This assertion represents speculation in its purest form since unlike the trial judge who reduces to writing the factual basis for imposition of a death sentence, Florida Statutes § 921.141(3), the jury's recommendation is not accompanied by a written statement setting forth the factual basis therefor (see R 292). Thus, Petitioner, not having been privy to the jury's deliberations, has absolutely no foundation for his assertion. Indeed, if Respondent engaged in such speculation, it could, on equally sound footing, state that the jury's life recommendation, rather than arising from doubt as to guilt since they had already found Petitioner guilty beyond a reasonable doubt, was instead occasioned by the emotional display of Petitioner's mother at the sentencing proceeding (R 319,451,452,455), which certainly would not, by any stretch of the imagination, qualify as a relevant mitigating factor under Lockett and Eddings.

While Petitioner's reliance upon such a faulty premise is cause for concern, even more alarming is the position he advances on the authority of Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), King v. Strickland, 36 Cr.L.Rptr. 2251, Case No. 82-5306 (11th Cir. Dec.3, 1984), and Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).[1]

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[1]None of these cases addressed the issue of whether "doubt as to guilt" constitutes a sufficient basis under Tedder v. State, infra, to reverse a trial judge's override of a jury life recommendation. Smith v. Balkcom, involved inter alia, a claim that a death qualified jury violated the defendant's rights under the Sixth and Fourteenth Amendments. King v. Strickland and Smith v. Wainwright yielded the language quoted by Petitioner in their treatment of ineffective assistance of counsel claims.

Apparently Petitioner suggests that where a possibility of lingering or whimsical doubt as to guilt exists, a jury override could never be sustained under the Tedder test (see footnote 2, infra). If this is the case, the Tedder test, rather than being a barrier to judicial caprice, becomes an absolute bar to the exercise of a statutory duty. In effect, Petitioner urges the creation, by judicial fiat, of a per se rule of reversal--a practice which this Court has soundly condemned as an abdication of judicial responsibility. United States v. Hastings, ___ U.S.___, 103 S.Ct.___, 76 L.Ed.2d 96,106 (1983).

Secondly, Petitioner states that the Florida Supreme Court's opinion herein was violative of the Eighth and Fourteenth Amendments "as the Florida Supreme Court unconstitutionally limited the relevant evidence the jury could consider which reflected upon the character of the offense." (P i). Respondent maintains that the Florida Supreme Court's opinion is wholly devoid of any mandate operating to preclude defense counsel from arguing and the sentencer from considering "doubt as to guilt" in mitigation. Rather, the opinion indicates that "doubt as to guilt", when predicated upon the inconsistent testimony of a witness, the question of whose credibility had previously been resolved adversely to the defendant, does not constitute a sufficient basis upon which to conclude that the trial judge's override of the jury's life recommendation was improper under the standard of review set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975).[2]

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[2] "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra at 910. See also Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344,357,358 (1977), where this Court characterized the Tedder test as "exacting standards" and "a crucial protection" that demonstrated that Florida's new death penalty statute affords significantly more safeguards to the defendant than did the old.

Accordingly, Respondent submits that, stripped of speculation and misinterpretation, the question presented is:

> WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The portion of the Florida Supreme Court's opinion with which Petitioner takes issue is the following:

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d. 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d. 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. See, e.g., Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99,S.Ct. 293, 58 L.Ed.2d 265 (1978). [Emphasis added.]

Burr v. State, 466 So.2d 1051,1054 (Fla. 1985). It is readily apparent from the above emphasized language and the court's citation of Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983) and Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), that the issue perceived and resolved by the court was whether, under the Tedder test, the trial judge's jury override was proper. The court concluded that it was, finding that there were several aggravating circumstances, no mitigating circumstances,[3] and no reasonable basis discernible from the record for the jury to recommend life. Burr v. State, supra at 1054. Thus, Respondent contends that the error, if any, lies in the Florida Supreme Court's upholding the jury override under the Tedder test--a putative error of state law. In Barclay v. Florida, ____ U.S.____, 103 S.Ct. ____, 77 L.Ed.2d 1134 (1983), where, as here, the petitioner's claim suggested that the Florida Supreme Court failed to properly apply its own cases in upholding his death sentence, this Court stated:

> The obvious answer to this question, as indicated in the previous discussion is that mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728,731, 92 L.Ed. 1683, 68 S.Ct. 1256 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.

Id. at 77 L.Ed.2d 1149. Similarly, in Spaziano v. Florida, 468 U.S. ____, 104 S.Ct. ____, 82 L.Ed.2d 340 (1984), this Court, speaking to the Tedder test, opined:

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[3]The trial judge, in his Findings of Fact for Sentence (R 311-320), stated: "Against this backdrop of aggravating circumstances, try as I may to find mitigating circumstances from the evidence, I cannot." (R 320).

> Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> * * *
>
> It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. See Barclay v. Florida, ___ U.S., at ____, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (Stevens, J., concurring in the judgment). Whether or not "reasonable people" could differ over the result here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case.

Id. at 82 L.Ed.2d 356,357. Thus, Petitioner's claim, involving as it does, nothing more than a suggestion of an error in state law, leaves him without the proper basis to invoke this Court's certiorari jurisdiction. Barclay v. Florida, supra; Spaziano v. Florida, supra.

Respondent further argues that even if the Florida Supreme Court's rejection of "doubt as to guilt" as a ground to strike down the jury override on the facts of the case sub judice is construed to present a federal question, the court's decision is not in conflict with Lockett and Eddings.

Lockett and Eddings stand for the proposition that under the Eighth and Fourteenth Amendments, neither the state legislatures by statute, nor the state courts as a matter of law, can preclude the sentencer in capital cases from considering all relevant mitigating evidence. See Barclay v. Florida, supra, Stevens, J., concurring at 77 L.Ed.2d 1151, n.2. So, in order to establish the requisite conflict, the Florida Supreme Court's decision herein must necessarily operate, as a matter of law, to preclude

the capital sentencer from considering relevant mitigating evidence. Respondent contends that it does not for one significant reason.

This Court noted in Lockett v. Ohio, supra, "[n]othing in this opinion limits the traditional authority of a Court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 57 L.Ed.2d 990, n.12. In the case at bar, Petitioner argues that the relevant mitigating evidence was "doubt as to guilt". This "relevant evidence" was supplied by Domita Williams' inconsistent testimony. Thus, "doubt as to guilt", on the facts of this case, can only be expressed in terms of her credibility, the question of which, as pointed out above, was resolved by the jury adversely to Petitioner during the guilt phase of the trial. The simple fact of the matter is that the previously resolved question of Domita Williams' credibility, aside from being purely a jury question, is an entirely irrelevant concern to the sentencer because it has absolutely no bearing upon Petitioner's character, prior record, or the circumstances of the offense. Moreover, the instant case does not present an Eddings issue in its truest form since the trial judge did not express a desire to consider "doubt as to guilt" as a mitigating factor and conclude that he was prohibited from doing so as a matter of law. Consequently, under Lockett and Eddings, neither the trial court nor the reviewing court committed a constitutional trespass in rejecting Petitioner's "doubt as to guilt" claim.

In sum, the writ should not be granted herein because Petitioner's claim presents nothing more than a putative error in state law which in turn is an insufficient

basis for the exercise of this Court's certiorari jurisdiction. Barclay v. Florida, supra; Spaziano v. Florida, supra. Additionally, even if Petitioner's claim was viewed as presenting a federal question controlled by Lockett and Eddings, the Florida Supreme Court's decision herein was in harmony, rather than conflict, with those cases thereby leaving Petitioner without a proper basis for invoking this Court's certiorari jurisdiction.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, Respondent respectfully requests this Honorable Court deny the instant petition for writ of certiorari.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

The Capitol
Tallahassee, Florida 32301

(904) 488-0290

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to David A. Davis and Steven L. Bolotin, Assistant Public Defenders, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida, 32302 on this 24th day of July, 1985.

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

APPENDIX

ront of the victim's chest, one one to the abdomen, and two to st. At some point during or following the stabbing, Medi- ose cloth gag in the victim's cording to the medical examin- n took ten to thirty minutes to perienced considerable pain. *reston v. State*, 444 So.2d 939 victim's throat slash d, sur- rcumstances can support find- , atrocious, or cruel); *Peary v.* So.2d 200 (Fla.1983) (stabbing finding heinous, atrocious, or gravation). The record shows . had an obsession for cars and endous desire to own his own ecord supports the conclusion of dge that he killed the victim, w, to obtain her car. He later o sell it to raise bond money for nd. *Compare Middleton v.* So.2d 548 (Fla.1982), *cert. de-* U.S. ——, 103 S.Ct. 3573, 77 13 (1983) (stealing victim's car and selling pistols supports pecuniary gain).

as a behavorial problem. He at he had been hospitalized for blems in Cuba. His actions ap- impulsive at times. The trial idered and weighed both the nd nonstatutory mitigating evi- found that Medina had no signif- criminal history. The trial found, however, that the non- nitigating evidence was entitled eight and that the aggravating es outweighed the mitigating *Compare Foster v. State*, 369 Fla.), *cert. denied*, 444 U.S. 885, 78, 62 L.Ed.2d 116 (1979) (death firmed for stabbing death and en though defendant had exten- y of mental illness).

that no reversible error occurred a trial and that competent, sub- idence supports the convictions ces. We therefore affirm those s and sentences.

ordered.

Cite as 466 So.2d 1051 (Fla. 1985)

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Charlie Lewis BURR, Appellant,

v.

STATE of Florida, Appellee.

No. 62365.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied April 26, 1985.

Defendant was convicted in the Circuit Court in and for Leon County, Charles E. Miner, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Boyd, C.J., held that: (1) fact that State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to support conviction; (2) there was no evidence that State witness' testimony was made under coercion or duress; (3) evidence of collateral crimes was relevant to establish identity and intent; and (4) trial judge did not err in imposing death sentence over jury's recommendation of life imprisonment.

Affirmed.

Overton and McDonald, JJ., concurred in conviction, but dissented from sentence.

1. Grand Jury ⇐21

Defendant's showing that very few blacks had served as grand jury foremen in county did not constitute a prima facie case of racial discrimination in grand jury foreman selection.

2. Homicide ⇐253(1)

That State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to convict defendant of first-degree murder.

3. Criminal Law ⇐706(2)

Where witness, who testified against defendant only after being advised by State attorney of consequences of committing perjury and of importance of telling the truth, admitted on cross-examination that State attorney had neither threatened her nor behaved in a hostile manner, and where testimony implicating defendant was consistent with witness' original statements to her friends and police, witness' testimony was not the product of coercion or duress.

4. Criminal Law ⇐369.15, 371(4)

In prosecution for first-degree murder of store clerk during convenience store robbery, evidence of collateral crimes, namely, the testimony of other convenience store clerks to effect that defendant had robbed them, was relevant and admissible to establish identity and intent.

5. Criminal Law ⇐1037.1(2)

Defendant failed to preserve for appellate review issue of whether trial court erred by failing to control State's inflammatory and prejudicial argument, where no objections were made with respect to the comments.

6. Criminal Law ⇐723(4)

Prosecutor's statement that there were people who were scared and that defendant "executes" people was not so unduly inflammatory or prejudicial as to warrant mistrial.

7. Criminal Law ⇐665(4)

Where it was shown that rebuttal witness' testimony was not substantially different from what it would have been had she not heard testimony of witness she was rebutting, trial court did not abuse its discretion in allowing rebuttal witness to testify.

8. Homicide ⇐354

Evidence supported findings that murder of convenience store clerk during robbery was committed for purpose of avoid-

ing lawful arrest and in a cold, calculated and premeditated manner without pretense of any moral or legal justification, both aggravating circumstances used to support death sentence. West's F.S.A. § 921.-141(5)(e), (i).

9. Homicide ⇐354

Trial judge did not err in imposing death sentence over jury's recommendation of life in prosecution for first-degree murder of convenience store clerk during robbery where there were several aggravating circumstances and no mitigating circumstances and there was no reasonable basis for jury to recommend life.

David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, for appellee.

BOYD, Chief Justice.

This case is before us on appeal of a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Charlie Burr was indicted for the first-degree murder of a store clerk during a robbery at a convenience store near Tallahassee. At the trial the state's key witness was Domita Williams who testified that she was with appellant the morning of the murder. She testified that they drove to the store where she bought a cheeseburger and candy bar and that when she returned to the car appellant entered the store. She said that she heard a shot and then appellant came out. According to her testimony, they then drove to an apartment where appellant was staying and she told Katrina Jackson and Tammy Footman about the incident. Upon being called as a witness, Katrina Jackson at first denied Williams had told her anything, but after being declared a hostile witness and upon cross-examination by the state, she corroborated Williams' testimony. The state then presented evidence of collateral crimes. Three convenience store clerks from Brevard County testified that appellant robbed and shot them in three separate incidents within a period of nineteen days after the murder charged in the instant case.

The defense called Domita Williams as its main witness. She recanted her earlier testimony and claimed that she was not with appellant the morning of the murder.

In rebuttal the state proffered Tammy Footman's testimony; she had heard the previous day's testimony where Williams had inculpated appellant, but had not heard Williams' recantation. Over appellant's objections, Footman was allowed to testify concerning Williams' statements to her to the effect that she was present at the murder. An investigator was also allowed to testify about Williams' statements to him, which were consistent with her original testimony. An interview of Williams, recorded on audiotape, was played for the jury.

The jury found appellant guilty of first-degree murder and robbery with a firearm. At the sentencing hearing the state presented no additional evidence. The defense presented several witnesses who testified that appellant was a good man and had been raised a Christian. The jury recommended a sentence of life imprisonment.

Notwithstanding the jury's recommendation of a life sentence, the trial judge sentenced appellant to death. In support of his sentence, the judge found as aggravating circumstances that the murder was committed during the course of a robbery, that it was committed to avoid or prevent a lawful arrest, and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The judge found nothing in mitigation.

[1] Appellant's first argument on appeal is that he was denied due process of law because the selection of grand jury foremen in Leon County is racially discriminatory. Appellant moved to dismiss the indictment, claiming he made a prima facie case of racial discrimination by showing that very few blacks have s
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443 So.2d 78 (Fla.1983) and
that the court did not err
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son County is racially discrimi-
ellant moved to dismiss the
aiming he made a prima facie
l discrimination by showing

that very few blacks have served as grand jury foremen in Leon County. We rejected a similar argument in *Andrews v. State*, 443 So.2d 78 (Fla.1983), and therefore hold that the court did not err in denying the motion to dismiss.

[2] Appellant's next argument is that there is insufficient competent evidence to support affirmance of his conviction and that in the interest of justice he should be granted a new trial. *See* Fla.R.App.P. 9.140(f). Appellant concedes that there is legally sufficient evidence, in the form of Ms. Williams' testimony, to support his conviction, but that such evidence is not competent since Ms. Williams recanted her earlier incriminating testimony. He argues that a witness cannot be considered credible when giving one story and incredible when giving another. The logical conclusion of appellant's argument is that juries must believe all or none of a particular witness's testimony. The fallacy of this conclusion is self-evident. Obviously, a witness can tell the truth about some matters and lie about others. In this case, to reach a verdict of guilty, the jury had to believe Ms. Williams' original testimony and disbelieve her recantation. It is not this Court's function to reweigh the evidence, but only to ensure its legal sufficiency. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The evidence was legally sufficient, and we do not find that the interests of justice require a new trial in this case.

[3] Appellant also argues that the conviction should be reversed in the interest of justice because Ms. Williams originally testified under duress. The record shows that on the day of the trial Ms. Williams indicated for the first time that her testimony would not implicate appellant. The state attorney then conferred with her and advised her of the consequences of committing perjury and of the importance of telling the truth. After this conversation, Ms. Williams testified as originally expected. During her recantation she explained that she had changed her mind and agreed to testify against appellant because the state attorney was furious with her and had threatened to put her in jail. However, on cross-examination by the state, Ms. Williams testified that the state attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. This admission and the fact that her testimony implicating appellant was consistent with her original statements to her friends and the police belie appellant's contention that Ms. Williams' testimony was the product of coercion or duress.

[4] Appellant's next point on appeal is that the trial court erred by allowing into evidence the testimony of the other convenience store clerks to the effect that he had robbed them. Appellant contends that their testimony was not relevant to any issue of material fact. The state responds that such evidence was relevant to show identity, by showing the similarities between those shootings and this one, and to prove appellant had the intent to kill the victim. The state attempted to prove this latter element through the testimony of one of the other convenience store clerks who testified that appellant told him he was going to kill him.

We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla.Stat. (1981). Since this evidence did not become a major feature of appellant's trial, appellant was not improperly prejudiced by its admission. *See Williams v. State*, 117 So.2d 473 (Fla.1960).

[5] Appellant next argues that the court erred by failing to control the state's inflammatory and prejudicial argument. However, no objections were made with respect to the comments appellant now complains about, except for one of them. We therefore find that this point has not been properly preserved with respect to most of the comments appellant now claims

were improper. *See e.g. Steinhorst v. State*, 412 So.2d 332 (Fla.1982).

[6] The one comment appellant did object to was the prosecutor's statements that there were people who were scared in this case and that appellant "executes" people. The trial judge ruled that such statements were a fair comment upon the evidence and denied appellant's motion for a mistrial. We do not find these statements to have been so unduly inflammatory or prejudicial as to warrant a mistrial. *See Blair v. State*, 406 So.2d 1103 (Fla. 1981).

[7] Appellant's final argument with respect to the validity of his conviction is that the trial court erred in allowing a witness to testify in violation of the rule of sequestration. After Ms. Williams recanted and testified for the defense, the state called Tammy Footman as a rebuttal witness. Appellant objected on the grounds that Ms. Footman had been present during Ms. Williams' original testimony. The state proffered Ms. Footman's testimony, and the trial court ruled that only that part of her testimony that was consistent with her previous statement could be admitted. Because it was thus shown that Ms. Footman's testimony was not substantially different from what it would have been had she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify. *Steinhorst v. State; Dumas v. State*, 350 So.2d 464 (Fla. 1977).

[8] With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. *See* § 921.141(5)(e), (i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

[9] Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. *See, e.g., Stevens v. State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

The aggravating circumstances adequately established and properly found by the sentencing court were:

(1) that the murder was committed in the course of a robbery;

(2) that the murder was committed for the purpose of avoiding arrest and prosecution;

(3) that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.

There were no mitigating c
A sentence of death in this c
ent with capital sentencing
this Court in similar cases

The judgment of conviction
tence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH
JJ., concur.

OVERTON and McDONAL
in the conviction, but dissent
tence.

In re ESTATE OF
GAINER, Decea

Carol GAINER, Individua
sonal Representative of
Holly E. Gainer, A

v.

Dorothy DORAN a
Adams, Appell

No. 64,874

Supreme Court of

Feb. 14, 19

Rehearing Denied M

Appeal was taken fr
the Circuit Court, Breva
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tor's assets in federal s
association account belon
joint holder. The District
443 So.2d 473, held that
tion Act unconstitutiona
protection to beneficiari
representative appealed
Court, Alderman, J., helc
sociation Act's conclu

shot in the back of the head
ng down, supported the conclu-
e murder was committed in the
in execution. We find no error
dings.

lly, appellant claims that the tri-
ed in imposing the death sen-
the jury's recommendation of
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ffer as to the appropriate pun-
ause Ms. Williams' recantation
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appellant had indeed committed

However, a "convicted de-
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2d.2d 819 (1982). There were
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U.S. 943, 94 S.Ct. 1950, 40
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) S.Ct. 293, 58 L.Ed.2d 265

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g court were:
the murder was committed in
of a robbery;
the murder was committed for
e of avoiding arrest and prose-

the murder was committed in
ulated, and premeditated man-
t pretense of moral or legal
1.

There were no mitigating circumstances. A sentence of death in this case is consistent with capital sentencing approved by this Court in similar cases.

The judgment of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but dissent from the sentence.

In re ESTATE OF Holly E. GAINER, Deceased.

Carol GAINER, Individually and as Personal Representative of the Estate of Holly E. Gainer, Appellant,

v.

Dorothy DORAN and Mary Adams, Appellees.

No. 64,874.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied May 1, 1985.

Appeal was taken from judgment of the Circuit Court, Brevard County, Clarence T. Johnson, Jr., J., holding that testator's assets in federal savings and loan association account belonged to surviving joint holder. The District Court of Appeal, 443 So.2d 473, held that Savings Association Act unconstitutionally denied equal protection to beneficiaries, and personal representative appealed. The Supreme Court, Alderman, J., held that Savings Association Act's conclusive presumption that, absent fraud, joint accounts vest in survivor did not violate equal protection.

Decision of District Court of Appeal reversed in part and cause remanded.

Ehrlich, J., filed dissenting opinion.

1. Joint Tenancy ⇐6

Statute creating conclusive presumption that, absent fraud, joint accounts held in federal savings and loan associations would vest in survivor was intended to provide certainty as to nature of joint account with right of survivorship which it encompassed. West's F.S.A. § 665.063(1)(a).

2. Joint Tenancy ⇐6

Legislature had authority to enact statute creating conclusive presumption that, absent fraud, joint accounts in federal savings and loan associations would vest in survivor. West's F.S.A. § 665.063(1)(a).

3. Joint Tenancy ⇐2

For purposes of equal protection analysis, classifications established by Savings Association Act and banking code concerning entitlement to assets held in joint accounts were depositors in federal savings and loan associations on the one hand and depositors in state banks, rather than testamentary beneficiaries, on the other hand. F.S.1979, §§ 659.291, 665.271; West's F.S.A. § 665.063(1)(a).

4. Constitutional Law ⇐213.1(1)

Classification within context of equal protection clause is the grouping of things because they agree with one another in certain particulars and differ from other things in those particulars. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

5. Constitutional Law ⇐48(6)

Party who challenges classification within context of equal protection clause has burden of proving that it does not rest upon reasonable basis. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 2.

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CRIMINAL DIVISION

IN THE SUPREME COURT OF FLORIDA

FRIDAY, APRIL 26, 1985

CHARLIE LEWIS BURR, **

Appellant, ** CASE NO. 62,365

vs. ** Circuit Court Case No. 81-183
(Leon County)

STATE OF FLORIDA, **

Appellee. **

Received
5-1-85
Florida Attorney
General

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD C.J., ALDERMAN, EHRLICH and SHAW, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

SUPREME COURT OF THE STATE OF FLORIDA

Deputy Clerk

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judge

David A. Davis, Esquire
Gregory G. Costas, Esquire

kb cert
date 8/19/85
SC14 PAGE 51

ORIGINAL

Supreme Court, U.S.
FILED
AUG 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 84-6982

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE L. BURR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

REPLY BRIEF ON

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEYS FOR PETITIONER

(Members of the Bar of this Court)

QUESTION PRESENTED

PAGE

QUESTION PRESENTED 1

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE.

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QUESTION PRESENTED

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE.

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

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REASONS FOR GRANTING THE WRIT

A. Introduction

The State of Florida, apparently recognizing that petitioner is entitled to review in this Court if the question he had presented is an accurate statement of the legal and ethical principles at issue in this case [see the state's brief in opposition, p.9], has attempted to rephrase the question and to bury the issue under a mound of verbiage. Petitioner, in reply, will show (1) that the issue he has raised is one of federal constitutional dimension, predicated on the Eighth and Fourteenth Amendments and the principles set forth in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982); (2) that it can reasonably be inferred that the basis for the jury's life recommendation in this case was the existence of some residual doubt as to petitioner's guilt, and that, in any event, the Florida Supreme Court has clearly (if not consistently) held, in this and other cases, that such residual doubt is as a matter of law an unreasonable and irrelevant consideration for the jury in deciding whether to recommend, and the judge in deciding whether to impose, the death penalty or a life sentence; and (3) that the overwhelming voice of legal reasoning and precedent (including, inter alia, the Model Penal Code provisions upon which Florida's and most other states' death penalty statutes are based), as well as common sense and simple fairness, require that residual doubt as to a defendant's guilt be recognized as a relevant and important consideration in capital sentencing, in accordance with the principles of Lockett and Eddings, and with the societal values embodied in the Eighth Amendment.

B. The Federal Constitutional Issue

The Supreme Court of Florida squarely held in this case that residual doubt as to a defendant's guilt, or the possibility of his innocence, or the relative weakness or inconclusiveness of the evidence of guilt are, as a matter of law, unreasonable and irrelevant considerations in capital sentencing. As it had done in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), and

as it had done sub silentio in Heiney v. State, 447 So.2d 2d 210 (Fla. 1984) [see Heiney v. Florida, ___ U.S. ___, ___ S.Ct. ___, 83 L.Ed.2d 237 (1984) (Justices Marshall and Brennan dissenting from denial of certiorari)], the state Supreme Court took the simplistic view that:

> ... [A] convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath to say someone else may have done it, so we recommend mercy.

Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985).

In his brief on appeal, petitioner argued strenuously that residual doubt as to guilt is a reasonable, even a compelling, basis for a life recommendation, and that the Eighth and Fourteenth Amendments, and the principles of Lockett v. Ohio, require that under such circumstances the life recommendation be given effect.[1] [See Appendix D 41-50, E 10-11]. As the state, in its brief in opposition to certiorari (p.8), correctly asserts, the Florida Supreme Court did not address the constitutional issue, and instead "perceived and resolved the issue as one resting solely on state grounds." However, the Florida Supreme Court, as it did in Buford and Heiney, perceived and resolved the issue wrong. Regardless of whether it purports to do so as a matter of federal law or as a matter of state law, a court cannot constitutionally preclude consideration of relevant mitigating factors.[2] Lockett v. Ohio, supra, 438 U.S. at

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[1] Under the so-called Tedder standard, a Florida trial judge may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that no reasonable person could differ." See e.g. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Provence v. State, 337 So.2d 783, 787 (Fla. 1976); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982). Where there is any reasonable basis for the jury's life recommendation, the trial court is not free to substitute his own judgment to override it. See Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Walsh v. State, supra, at 1003. This Court, in rejecting constitutional challenges to the "life override" procedure, has done so on the assumption that the Florida Supreme Court "takes [the Tedder] standard seriously." Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340, 356 (1984).

[2] Presumably, for example, the Ohio Legislature perceived the issue as one of "state law" when it enacted the statute which was subsequently held unconstitutional in Lockett because it precluded consideration of relevant mitigating factors. Notwithstanding the state's attempt to obfuscate the issue, the fact remains that a state court does not necessarily need to mention the federal constitution in order to violate it.

992. See People v. District Court of State, 586 P.2d 31, 35 (Colo. 1975). Thus, the real question to be resolved here is whether matters regarding residual doubt as to guilt, or the possibility of innocence, or the inconclusiveness of the evidence of guilt are in fact relevant considerations in determining whether to recommend or impose the death penalty. And the answer is that of course these matters are relevant. ALI, Model Penal Code, Section 201.6(1), p.107 (Off. Draft, 1980); see e.g. Furman v. Georgia, 408 U.S. 238, 366-68 (1972) (Justice Marshall concurring); Heiney v. Florida, supra, 83 L.Ed.2d at 238 (Justices Marshall and Brennan dissenting from denial of certiorari); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); Smith v. Balkcom, 660 F.2d 573, 580-82 (5th Cir. 1981); Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984); People v. District Court of State, supra, at 35.

C. The Basis of the Jury's Life Recommendation

The state next attempts to confuse the issue by characterizing as "speculation" petitioner's contention that residual doubt as to guilt was the basis, or a basis, for the jury's life recommendation. The state disingenuously suggests that "if Respondent engaged in such speculation, it could, on equally sound footing, state that the jury's life recommendation ... was instead occasioned by the emotional display of Petitioner's mother at the sentencing proceeding (R 319, 451, 452, 455)...."[3] [State's brief in opposition, p.10]. First of all, petitioner is under no obligation to demonstrate that residual doubt as to guilt was the only conceivable basis for the life recommendation. Under the Tedder standard, where there is any reasonable basis for the jury's life recommendation, the trial court is not free to

[3] Burr's mother, Shirley Cooper, testified briefly that Burr's father died when he was young, that she used to take Burr to church and Sunday School when he was a child, that he worked in the landscaping business when he got old enough to work, and that he was a friendly person who was not a disciplinary problem and did not have a bad temper (R 450-51). Ms. Cooper testified that she loved her son and would like to see him be able to live (R 450-51). Apparently, Ms. Cooper was crying at that point in her testimony. The references to an "emotional display" at pages 452 and 455 of the record are from the prosecutor's closing argument, in which he told the jury that a mother's love for her son was understandable, but not to forget the victim, "Steve Hardy never came home. He never will come home" (R 452, 455-56).

substitute his own judgment to override it. See Shue v. State, supra, at 390; Malloy v. State, supra, at 1193; Welty v. State, supra, at 1164; Odom v. State, supra, at 942; Walsh v. State, supra, at 1003: Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). In Gilvin v. State, supra, at 999, the Florida Supreme Court, properly applying the Tedder standard, held that the trial court erroneously overrode the jury's life recommendation, noting that "[t]here was evidence of non-statutory mitigating factors ... upon which the jury could have based its life recommendation even though the trial court, in its judgment, was not necessarily compelled to find them." See Welty v. State, supra, at 1164-65; Cannady v. State, supra, at 731.

In the present case, defense counsel's closing argument in the penalty phase was brief and to the point (R 459-66). The only statutory mitigating circumscance he even mentioned, in passing, was Burr's age, which was 21 (R 461). Rather, his entire argument was focused on the inconclusive character of the evidence of Burr's guilt.[4] [In order to comply with the 10 page limitation of Supreme Court Rule 22, the pertinent portions of defense counsel's argument are set forth in Appendix J, which is attached to this reply brief].

Residual doubt as to guilt was thus, without question, the main factor in mitigation which the defense proffered to the jury, in asking it to return a recommendation of life. The jury did so, but the trial judge imposed death notwithstanding their recommendation. The Florida Supreme Court did not quarrel with petitioner's contention that residual doubt as to guilt was the basis of the jury's life recommendation; rather, it simply

---

[4] It is important to note that the Florida Supreme Court has recognized that a convicted capital defendant and his attorney, as a matter of principle or strategy, may maintain his innocence, and may forego presentation of other mitigating circumstances which could be viewed as damaging to the integrity of his claim of innocence. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). See also King v. Strickland, ___ F.2d ___ (11th Cir. 1984) (36 Cr.L. 2251) (noting that a skilled attorney may raise doubt of guilt to a sufficient level that, though not enough to defeat conviction, "might convince a jury and court that the ultimate penalty should not be exacted, lest a mistake may have been made."

reiterated its holding in Buford that doubt as to guilt is, as a matter of law, an unreasonable basis for a jury to recommend life. In so holding, the Florida Supreme Court committed a serious violation of the federal constitutional principles of Lockett and Eddings. Now comes the state, in its brief in opposition to certiorari, and says in mock seriousness, "Maybe the jury recommended life because his mother cried." This is nonsense, or worse. As the Florida Supreme Court has recognized (and as the state is fond of quoting when the shoe is on the other foot), "[t]he law requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." Paramore v. State, 229 So.2d 855, 860 (Fla. 1969); see also Valle v. State, ___ So.2d ___ (Fla. 1985) (case no. 61,176, opinion filed July 11, 1985) (jurors, in capital sentencing proceeding, are presumed to follow the trial court's instructions as to what evidence they may consider). In Cannady v. State, supra, at 731-32, the Florida Supreme Court recognized that there was a reasonable basis for the jury's life recommendation, and therefore refused to indulge in the speculation (which was given by the trial court as his reason for the override and which was argued by the state on appeal) that the life recommendation might have been based on sympathy for the defendant's family, who had brought an infant child into the courtroom. In the present case, the state did not even argue on appeal that the jury's life recommendation might have been based on something other than residual doubt as to guilt; it merely relied on the constitutionally unsound precedent of Buford to argue that a convicted defendant cannot be "a little bit guilty", and that if petitioner's jury recommended life for this reason, the recommendation was not based on a valid mitigating circumstance, and was as a matter of law unreasonable. [See Appendix F 55-56]. This is the well-defined and important issue which petitioner seeks to litigate in this Court, under the principles of Lockett and Eddings. For the state to come up at this

stage of the proceedings and say, in effect, "Maybe the jury recommended life because they liked Burr's green tie" only demonstrates the state's inability to defend the Florida Supreme Court's position on the merits.

D. Residual Doubt as to Guilt as a Mitigating Circumstance

The state says it finds petitioner's position that residual doubt as to guilt, or the possibility of innocence, is a relevant and reasonable consideration for the jury and judge in determining whether to impose life or death "alarming." [State's brief in opposition, p.10]. Petitioner submits that the position taken by the Florida Supreme Court and by the state is infinitely more alarming. Under the pernicious precedent of Buford and Burr, whenever a jury recommends life because of a genuine concern that the evidence does not foreclose the possibility of the defendant's innocence [see ALI, Model Penal Code, Section 201.6(1), p.107 (Off. Draft 1980)], that recommendation is per se unreasonable, and is subject to being overridden and replaced by a death sentence. While it may be true that any death penalty law entails a possibility that an innocent person may be executed [see Furman v. Georgia, 408 U.S. 238, 366-68 (1972) (Justice Marshall concurring)], what the Florida Supreme Court has done in this case virtually guarantees that this will happen, in situations where it could have been prevented. See Lockett v. Ohio, supra, 438 U.S. at 605 (recognizing that the nonavailability of corrective mechanisms with respect to an executed death sentence underscores the need for individualized consideration as a constitutional requirement in imposing such penalty). A jury's recommendation of life, where it finds that a residual doubt as to guilt exists, is a necessary "safety valve", and is in fact the only safety valve available, since the weight or credibility of "legally sufficient evidence" is no longer reviewable on appeal. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981). But the Florida Supreme Court has told the trial courts of the state that doubt as to guilt is neither a valid mitigating circumstance nor a reasonable

basis for a life recommendation, and so a death sentence is imposed notwithstanding these lingering doubts. What if Charlie Burr is executed and then it turns out that Domita Williams' testimony implicating him was a lie? (As she admitted at trial, under oath, that it was). It would be awful enough if that happened, even if the jury had recommended death. But if it happened despite the jury's recommendation of life, because the Supreme Court of Florida has decided as a matter of law that you can't be "a little bit guilty", it would be constitutionally and morally intolerable.

Virtually all post-Furman death penalty statutes are based on the approach taken in the Model Penal Code as adopted by the 1962 meeting of the American Law Institute. See Proffitt v. Florida, 428 U.S. 242, 247-48 (1976); Gregg v. Georgia, 428 U.S. 153, 189-91, 193-95 (1976); Jurek v. Texas, 428 U.S. 262, 270-71 (1976); Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982). Model Penal Code §210.6 provides for a separate penalty proceeding before the trial court and jury, during which various aggravating and mitigating circumstances (most of which are identical or very similar to those enumerated in the Florida statute) may be established and are weighed to determine whether a life sentence or a death sentence is appropriate. However, under certain circumstances, no penalty phase is conducted at all; the trial judge simply imposes a sentence of life imprisonment if one or more of the considerations listed in §201.6(1) are met. One of these circumstances under which a death sentence is excluded is "(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." In the 1980 Revised Comments to Model Penal Code §201.6 (at p.134), this provision was explained as follows:

> Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

It needs to be made absolutely clear at this point that petitioner is not arguing that Florida or any other state is constitutionally compelled to adopt or apply the Model Penal Code in its entirety. Rather, petitioner is relying on the Model Penal Code provision (among other sources) because it conclusively demonstrates that some residual, but genuine, doubt as to guilt, and the nature or quantity of the evidence of guilt, are relevant and often compelling considerations in mitigation of a potential death sentence. Indeed, the framers of the Model Penal Code considered these matters to be so critically relevant to the issue of penalty that a death sentence should be precluded, notwithstanding the hypothetical existence of a dozen aggravating circumstances, where the evidence does not foreclose all doubt of guilt.

Since, as the Model Penal Code provision illustrates, the strength or weakness of the evidence of guilt is a consideration reasonably relevant to the question of mitigation of punishment, it is clear that a defendant must be allowed to submit to the jury, as non-statutory mitigation under Lockett, 1) that, while recognizing that he has been found guilty of the capital offense, he maintains his innocence, and 2) that the evidence is not of such a conclusive character as to foreclose the possibility of his innocence. He may attempt to persuade the jury that based on these considerations he should receive a life sentence rather than the irrevocable penalty of death. In the event that the jury agrees, and returns a life recommendation based on these non-statutory mitigating factors, there is a reasonable basis for the recommendation, and (under the Tedder standard) it must be given effect. Otherwise, the Florida death penalty statute is unconstitutional under Lockett v. Ohio. See People v. District Court of State, 386 P.2d 31 (Colo. 1978), in which the Colorado Supreme Court held that state's death penalty statute unconstitutional under Lockett, in that it restricted consideration of mitigating circumstances to those enumerated in the statute. Rejecting the state's suggestion that it construe the subsection setting forth statutory mitigating circumstances as allowing for presentation and consideration of non-statutory mitigation as well, the court noted several impediments to such a construction:

> First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence 'at the time of the offense.' Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442, 449-50, n.19 (1977).
>
> Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.

People v. District Court of State, supra, at 35.

The most compelling reason why residual doubt as to guilt must be recognized as a legitimate mitigating circumstance and as a reasonable basis for a life recommendation is the simple undeniable fact that an innocent person can be convicted. Charlie Burr maintains his innocence; as a matter of law he is guilty, but as a matter of fact he may not be. As Justice Marshall, concurring in Furman v. Georgia, supra, 408 U.S. at 366-68 (1972) observed:

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is latter convincingly established are convicted and sentenced to death.
>
> * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.

The foregoing was written by Justice Marshall in support of his position (which he and Justice Brennan have maintained in Furman and in all cases thereafter) that the death penalty is unconstitutional per se. However, even assuming arguendo that the death penalty may constitutionally be imposed under certain circumstances, a state cannot preclude consideration by the judge and jury of relevant mitigating factors proffered by the defendant as a basis for a sentence less than death. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. The Florida Supreme Court's obdurate refusal to recognize residual doubt as to guilt as a legitimate

mitigating circumstance or even as a relevant consideration in capital sentencing brings it into direct conflict with the principles set forth by this Court in Lockett and Eddings. To resolve this conflict, and to prevent the miscarriages of justice which are certain to follow in the wake of the Florida precedent, this Court should grant certiorari.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

STEVEN L. BOLOTIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, DC 20543; Mr. Charlie L. Burr, Jr., #084592, Post Office Box 747, Starke, Florida, 32091; and by hand delivery to the Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301 and to Gregory G. Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 14 day of August, 1985.

DAVID A. DAVIS
Assistant Public Defender

NO. 84-6982

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE L. BURR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

A P P E N D I X

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEYS FOR PETITIONER

(Members of the Bar of this Court)

Excerpts from Defense Counsel's Closing Argument
in the Penalty Phase

You are not limited to just those two [mitigating circumstances]. You can consider anything that you feel is appropriate to consider in terms of mitigation in this case in trying to make your recommendation to the judge.

One aspect I think you should consider and I ask you again to consider it and I argued to you at the close of the evidence before you retired to your verdict. I think obviously from your verdict you didn't agree with my arguments I made at the close of the trial. Hopefully, you believe beyond a reasonable doubt that Mr. Burr is the one who committed the offenses or you wouldn't have returned that verdict back. That's obvious. But, I ask you to think now as you turn your attention to what penalty you will recommend in this case, think about what you heard the evidence in this case to be.

Is it an overwhelming case of guilt here? Was it an overwhelming case of guilt here? You have Domita Williams. She's the only one that could possibly, in any way, link Mr. Burr to the offenses that were charged at the Suwannee Swifty. And you know -- I'm not going to go over that. She has come in here and told you that she hasn't been telling the truth the whole time.

She came in the second day of the trial and said that she had not been telling the truth, that she wasn't there at the time.

Now, you have to ask yourself, as you make a recommendation, you know, one way or the other in this case, is it possible -- is it possible that I'm recommending death for an innocent person? Is it possible that Mr. Burr did not commit these offenses?

Are you so sure that Domita Williams was not being truthful to you? Again, I reiterate that. Are you so sure she was not being truthful with you the second day she testified? Or are -- you heard testimony about Melbourne and Mr. Burr may have committed the offenses in Melbourne. Are you so sure you didn't render your verdict based on the fact that, well, he must have done this because the evidence showed that he did that, he must have done this.

But, does that logically, just necessarily go together? Could not Mr. Burr be innocent of the offense here and maybe he is guilty of the offense down there. He has to stand trial down there for those offenses. If the State had enough evidence again down there, then he will be convicted and he will have to face the consequences.

But, in this particular case, from all that you have heard from the various witnesses, are you so sure that Mr. Burr committed this offense? He has pled not guilty. He maintains his innocence

in this case. Nobody knows -- that the State presented -- only Domita Williams possibly could know. And she testified one way and then she testified the second day that she wasn't being truthful. Nobody else knows.

Mr. Meggs doesn't know what happened at the Suwannee Swifty that morning. Sergeant Ash doesn't know what happened at the Suwannee Swifty that morning. None of the witnesses the State called knows what happened at the Suwannee Swifty that morning.

The only thing you can rely on is Domita Williams. And she came in and told you that she wasn't there that particular morning. And there was other evidence to support her saying that. There was evidence that may have obviously supported that she was being truthful the first day. But, there is evidence that has indicated she could be truthful the second day. So, in terms of your recommendation in this case, I know it's a difficult situation and nobody picked -- you know, none of you picked to be on the jury in this case.

But, I know you have all been very attentive. I know it's been an ordeal for you. It's been an ordeal for me. It's been an ordeal for everybody involved in this case.

But, if you go back and recommend death in this case on the evidence that was presented at this trial as to what happened here and Mr. Burr is eventually electrocuted and put to death, then it's going to be a little too late for the truth to come out, because the truth is going to be -- it just wont' stop here. Things will be -- the truth will come out.

And I just ask you to consider all of the evidence in this case that you heard and ask yourself whether you are so sure that you can't be making a mistake in this case, there is no way that you can be mistaken in this case. And I think there are some serious questions about just what happened and whether Mr. Burr in fact committed the offenses charged here. (R 461-65).

. . . .

... So, ladies and gentlemen, with the doubts -- and there's got to be some question about what you heard. With that in mind and those considerations in mind, don't make a recommendation where a man is going to die when he may not have even committed the crime. Thank you. (R 466).

SUPREME COURT OF THE UNITED STATES

CHARLIE L. BURR *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 84-6982. Decided October 7, 1985

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

This petition presents the question whether the sentencing jury in a capital case may be prohibited from taking into account its own nagging doubts about the defendant's guilt as it considers whether the defendant deserves to die. The Supreme Court of Florida has squarely resolved that question in the affirmative, despite the clear message of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that a capital defendant is entitled to have the jury consider "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U. S., at 604.

Even if I accepted the prevailing view that the death penalty can constitutionally be imposed under certain conditions I would grant certiorari in this case to consider the grave constitutional question it presents. Today's decision lets stand a ruling that clearly "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett*, *supra*, at 605 (opinion of BURGER, C. J.), quoted in *Eddings*, *supra*, at 118 (O'CONNOR, J., concurring).

I

Petitioner, Charlie Burr, was charged with the murder of a convenience-store clerk during a robbery of the store. At trial, the state's key witness was Burr's girlfriend, Domita Williams, who testified that she had been waiting for Burr

outside the store when she heard a shot and then saw Burr come out. The state provided some circumstantial evidence in corroboration. The following day, however, Williams took the stand for the defense and recanted her testimony of the previous day. This time she swore that she had not been with Burr at all on the morning of the murder, and recited a different account of her actions that morning. The defense produced witnesses to support this testimony, including an eyewitness who placed Williams elsewhere at the time of the murder. The defense attempted to establish that Williams' first testimony had been the product of coercion by the prosecutor; the state, in turn, attempted to show that her second testimony was contrived out of fear of the petitioner. Without Williams' first testimony, the state would not have had a case, for while the state introduced evidence implicating Burr in similar robberies of other convenience stores, it adduced no other evidence directly linking Burr with this crime. The jury returned a verdict of guilty.

At the sentencing hearing, defense counsel devoted his entire closing argument to the inconclusive nature of the evidence against Burr. Counsel drove home to the jury the fact of Domita Williams' recantation, repeatedly exhorting each juror to "ask yourself . . . , is it possible that I'm recommending death for an innocent person?" Suggesting that the guilty verdict might have been based on the evidence of the other robberies, he admonished the jury, "if you go back and recommend death . . . and Mr. Burr is eventually electrocuted and put to death, then it's going to be a little too late for the truth to come out . . . ." He concluded, "don't make a recommendation where a man is going to die when he may not have even committed the crime."

The jury recommended a sentence of life imprisonment. The trial judge, however, overrode this recommendation and sentenced petitioner to death, having identified three aggravating circumstances and nothing in mitigation. Petitioner deduced, and argued on appeal, that the jury's recom-

mendation of life had been based, legitimately, on residual doubt of Burr's guilt. The Florida Supreme Court rejected this argument, concluding that "a 'convicted defendant cannot be "a little bit guilty."'" *Burr* v. *State*, 466 So. 2d 1051, 1054 (Fla. 1985), quoting *Buford* v. *State*, 403 So. 2d 943, 953 (Fla.), cert. denied, 454 U. S. 1164 (1981).

II

Implicit in the Florida Supreme Court's decision is an assumption about the equation of finality and truth that transgresses law and intuition alike. For our legal system is no pretender to absolute truth. In two important ways, the factfinding process falls short of that ideal. First, the beacon of the truth-seeking process in criminal cases is not absolute certainty, but the "reasonable doubt" standard, which has eluded definition by the courts for centuries. See 9 J. Wigmore, Evidence § 2497 (Chadbourn rev. 1981). Attempts at such a definition typically, and often erroneously, include phrases such as "significant doubt, not trivial doubt," *Holland* v. *United States*, 209 F. 2d 516, 522 (CA10), aff'd, 348 U. S. 121 (1954), and "substantial, real doubt," *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978). Although a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the "reasonable doubt" standard merely attempts "to exclude as nearly as possible the likelihood of erroneous judgment." *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). Hence, "beyond a reasonable doubt" cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds.

Moreover, no instruction can prevent the possibility of human error. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan,

J., concurring). Accordingly, the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous. Every jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence. If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness. Thus, the "reasonable doubt" foundation of the adversary method attains neither certainty on the part of the factfinders nor infallibility, and accommodations to that failing are well established in our society. See also *Jackson* v. *Virginia*, 443 U. S. 307, 317–318 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

Prominent scholars of our time agree. The Model Penal Code absolutely precludes the imposition of a death sentence if the sentencer is satisfied that, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting defendant's guilt." ALI, Model Penal Code §210.6(1), p. 107 (Off. Draft, 1980). Three Justices of this Court have stated that the possibility of an irrevocable mistake is a valid reason for a jury to conclude that the death penalty is not morally justified. *Spaziano* v. *Florida*, 468 U. S. ——, —— n. 34 (1984) (STEVENS, J., joined by BRENNAN and MARSHALL, JJ., concurring in part and dissenting in part); *Heiney* v. *Florida*, —— U. S. —— (1984) (MARSHALL, J., dissenting from denial of certiorari). Finally, two courts of appeals have determined that jurors may hold a *genuine*, if not a *reasonable*, doubt of guilt sufficient to support a sentence of life. *Smith* v. *Wainwright*, 741 F. 2d 1248, 1255 (CA11 1984), cert. denied, —— U. S. —— (1985); *Smith* v. *Balkcom*, 660 F. 2d 573, 580–581 (CA5 1981), cert. denied, 459 U. S. 882 (1982).

I have written before to describe the subjective personal horror that must face a juror who contemplates sentencing a man to die without being sure of his guilt. *Heiney* v. *Florida*, *supra*, at ——. But there is an additional point to be made: that permitting the consideration of lingering doubt at sentencing is objectively a rational and consistent element of our system of criminal justice. Like post-conviction remedies in light of new evidence, the conscience of the jury serves to protect against irremediable errors arising in that grey area known as "reasonable doubt." And when the stakes are life and death, the Constitution forbids the closure of that safety valve, as surely as it forbids the preclusion of other considerations suggesting that a convicted defendant should not die. See *Eddings* v. *Oklahoma*, *supra*.

The defendant who has been condemned to die will not reap the benefits of post-conviction remedies designed to compensate for jury fallibility when the basis for such relief arises long after conviction. His only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty.* The state of Florida would wrest from the jurors their only way of expressing their lingering doubts about their verdict, and from the defendant his only hope of vindication.

III

We cannot know the basis for a jury's recommendation of life, as long as the jury is not required to supply its reasons Nevertheless, in petitioner's case we do know several relevant things. First, we know that little, if any, mitigating evidence other than the possibility of innocence could have accounted for the jury's sentence. Second, we know that the defense counsel rested his plea for his client's life solely on

*To the extent that a jury recommendation of life based on doubt can be said to be inconsistent with that same jury's finding of guilt, the legitimacy of the guilty verdict itself is rendered unreliable and therefore constitutionally suspect. The remedy for such a defect is not a death sentence, but a new trial.

the striking inconclusiveness of the evidence against petitioner, conceding that this argument had not carried the day at the guilt phase, but imploring the jurors to consider it as a matter of conscience at sentencing. Third, we know that the Supreme Court of Florida considered petitioner's claim on its merits, without questioning the factual premise of the argument, and ruled that doubt as to a convicted defendant's guilt cannot be considered as a factor mitigating against the death sentence. This determination bars consideration of a factor that is both relevant, see *Eddings*, *supra*, at 113–114, and reasonable, see *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975). Under these compelling circumstances, this Court should not shrink from correcting a misguided principle of law that so surely increases the likelihood that innocent people will go to their deaths.

Rather than bristle at a superficial inconsistency between a guilty verdict and a life sentence based on doubt, we should readily acknowledge that a juror may understand the law to demand less than the conscience. In a capital case, the Eighth Amendment does not tolerate such a distinction.